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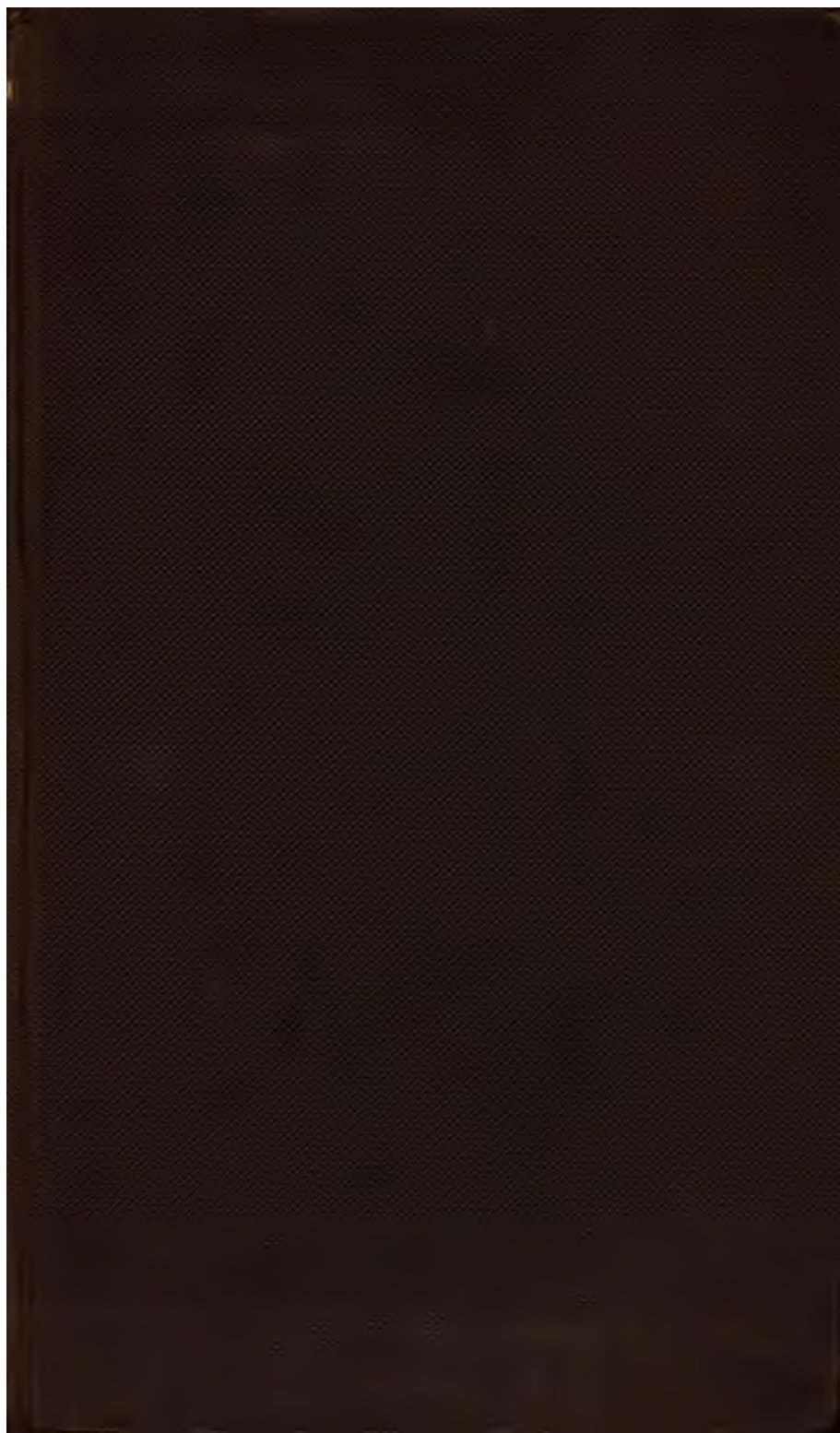
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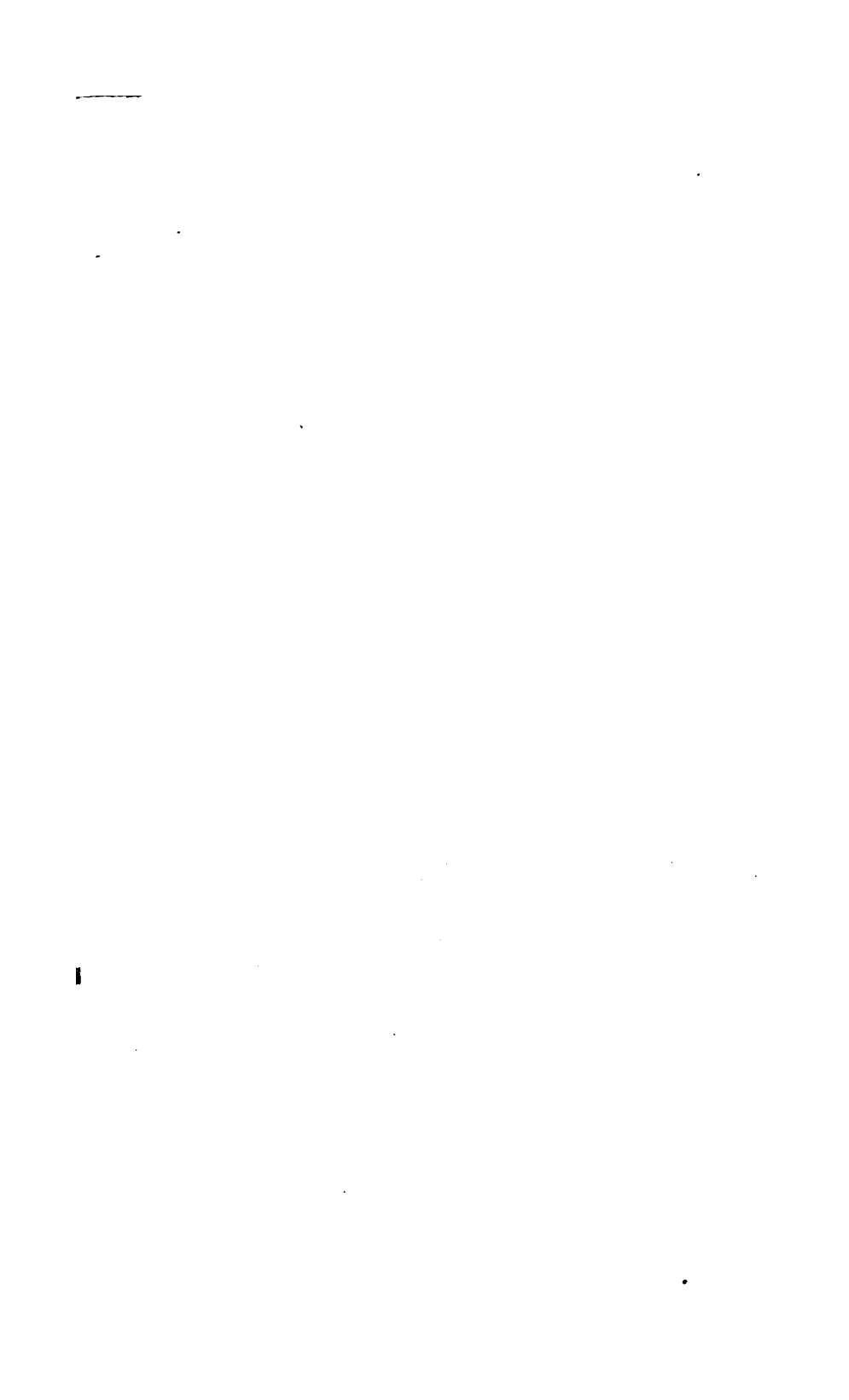
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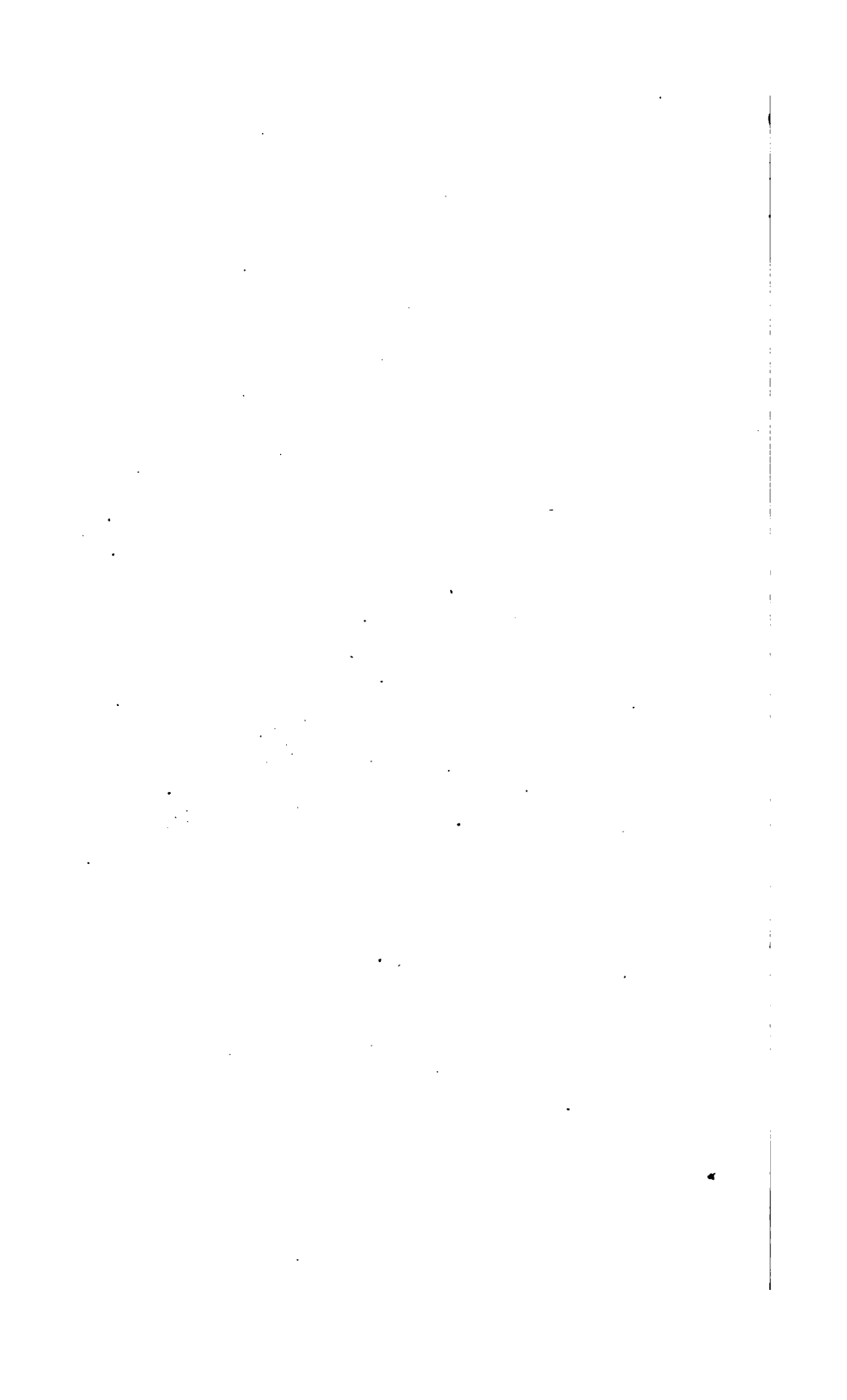
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THE  
LAW STUDENTS'  
FIRST BOOK,

BEING CHIEFLY AN ABRIDGMENT

OF

**Blackstone's Commentaries.**

INCORPORATING

THE ALTERATIONS IN THE LAW DOWN TO THE  
PRESENT TIME.

BY THE EDITORS OF

"THE LAW STUDENTS' MAGAZINE."



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### ERRATA, &c.

P. 98, line 19 from the top. *Dele* "greater part," and substitute "*whole*." See explanation at p. 450.

P. 101, lines 4 and 5 from the top. *Dele* "to take and enter appeals of murder." See explanation at p. 426.

P. 118. For "Chap. XIII.," read "Chap. XIV."

P. 183, line 21 from the top. For "and a right of kin," read "and a *next* of kin."

P. 189, the head line. Instead of "Title by Forfeiture," read "Title by *Prescription*."



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## PREFACE.

The title-page of this work will have given the reader a pretty accurate notion of its general scope, but still a few words by way of farther explanation may not be unacceptable.

Most law students commence their legal studies with the Commentaries of Blackstone, and, all things considered, it is not easy to point out a better work for the purpose. One objection which may not unfairly be made to the Commentaries as a first book, is, that to the commencing student the four volumes of which the work consists are too bulky. This objection is more especially felt by Articled Clerks, who usually commence their studies at an early age, and, indeed, in most cases, immediately after leaving school. The bulkiness of the work is caused by the great discursiveness of the learned commentator, and is most evident in

the historical portions. This is not imputed to Blackstone as a fault, but, however interesting and instructive to the more advanced student, it must be confessed that such extended disquisitions are apt to become tedious, and at least discouraging to a young beginner. In truth, most readers are incapable, on a first, or even a second perusal, of perceiving the connection of the subjects, or of forming a distinct idea of its several titles. The reader is lost amidst the very riches laid open to his view. These are some of the reasons why so many find their first perusal of the Commentaries so unsatisfactory; nor is this to be wondered at when it is considered that until a person obtains a general idea of the scope and subjects of a work, he cannot derive full advantage from its perusal: with the young law student this is peculiarly the case.

To obviate these objections is the intent of the present work. In the first instance, indeed, it was intended to have produced an entirely original work, but on further reflection this design was abandoned. The main inducement for this alteration was, that, as the work is only an introductory one, it would be best to adhere to the plan, and, as far as possible, to the language, of the work to which it is to be introductory. It will be readily

understood that the work here alluded to is the celebrated Commentaries of Blackstone. For the adoption of this course, two strong reasons may be adduced. In the first place, it would be impossible to produce an original work which could offer such powerful claims for support as one founded on the text of the commentaries themselves. In the second place, it must be evident that nothing could be more useful than to familiarise the young student with the plan, subjects, and even the language of the great work to which he was being introduced.

The present work, then, presents an *abridgment of those portions of the Commentaries which are law at the present day*. The abridgment is not, indeed, a literal one; but, generally speaking, all those portions of the Commentaries which a beginner can profitably study, have been carefully preserved. Merely to do this, however, would obviously not fully meet the wants of the student; and therefore, in addition, ample notice has been taken of the many alterations made in the law since Blackstone's time. Thus the student has presented to him a faithful view of the law as it at present exists. In fact, about one half of the present work is founded on Blackstone, whilst the other half

consists of notices of the late alterations in the law.

It should be stated that some of the chapters have been wholly re-written, on account of the great changes made since the Commentaries were published. This is the case with the chapters treating of Bankruptcy and Insolvency, the early sections of Proceedings at Law, the chapter of Equity Proceedings, Summary Proceedings before Justices, &c. To have attempted, in these instances, to weave in Blackstone's text would have been labour in vain, as scarcely a line is now law.

In order to enable the student readily to refer to Blackstone, and also to the new Commentaries of Mr. Serjeant Stephen (founded on Blackstone) a reference is made at the beginning of each chapter and section to the corresponding parts of those works. This will enable the student to read the present work alone or in connection with Blackstone or Stephen. The young beginner, however, is not recommended to adopt this latter course, but it may prove very useful to the more advanced student. It will be noticed that the chapters of the present work do not all correspond with Blackstone's Commentaries, which arises from the occasional compression of two or more of Blackstone's chapters

into one. Some slight deviation has also been made, in one or two instances, from the order of the original work, which, however, is only to the extent of treating of "PARLIAMENT" under the head of "STATUTE LAW," and collecting all the scattered portions of the Commentaries relating to "COURTS OF JUSTICE" into one chapter at the end of the work, which slight alterations will, it is hoped, be deemed improvements. It will be perceived that some of the statutes of the present session are embodied in the work, particularly the important statutes relative to proceedings in criminal cases, whilst some others are given in the Appendix. There are still some few of the statutes, but mostly unimportant, which are not noticed, they not being published at the time of completing this work.

It was originally intended not to give any other references than those at the head of each chapter and section, because the work being founded on Blackstone's Commentaries, requires no other support, except as to the new matter, which, however, invariably refers to its original—the statute law. But it was afterwards thought that it might be acceptable to the young student to have some references to works within his reach, and consequently the references to be found at the end of this volume



were added. It is hoped that the Editors will not be considered as having referred so often to their other works with any other design than to afford the reader further information from sources which, it is believed, will, in the majority of cases, be found already in his possession.

To render the work as complete and useful as possible there have been added a full Table of Contents, and a Translation of Latin Phrases.

In conclusion, it may be observed that though the work is peculiarly adapted to the young student, yet the more advanced may find it of some service, particularly if it be read concurrently with Blackstone or Stephen's Commentaries, or be used by way of reviewal.

1st September, 1848.

## CHAP. I.

### COMMON LAW OF ENGLAND.

[See 1 Black. Com. Introd. s. 3; 1 Steph. Com. Introd. sect. 3.]

England having been subject to various foreign rulers, each of whom engrafted upon the English law some portion of those laws under which the countries from whence they came were governed, the constitution of England consequently partakes of the Roman, Pictish, Saxon, Danish, Norman, and British laws. This well-known historical fact is here mentioned as explaining the great variety of customs which obtained at the common law.

*Lex scripta et non scripta.*] — The laws of England are of two kinds, namely, the unwritten (*lex non scripta*), or common law, and the written (*lex scripta*), or statute law.

The *lex non scripta*, or unwritten law, is a collection of maxims handed down in the records of the judicial decisions of our ancestors, called the common law of the country, in contradistinction to the *lex scripta*, or statute law of the land. In fact, the term "common law" *primâ facie* applies to those portions of our laws which had their origin prior to

the time of legal memory, that is, prior to the beginning of the reign of Richard I., though, of course, if any particular law can be traced to statutes prior to that time, it would properly belong to the *lex scripta*. All laws originating since that period are referable to statutes, and consequently form part of the *lex scripta*. The word "common law" is, however, used in other senses, among which is particularly to be noticed that where it is opposed to the doctrines of equity. Thus we speak of a remedy at the common law and of one in equity as opposed to each other, and in this sense "common law" has no reference to the distinction of *lex scripta* or *non scripta*, but rather to the forum or jurisdiction before which the matter is to be litigated (*a*).

It has by some persons been said that the judges make the common law, whereas they merely declare what it is. Thus, we continually find cases decided with reference to what the judges declare to be the common law (*b*).

In order to obtain more precise notions, and for conveniency of illustration, the *lex non scripta*, or unwritten law, may be considered as including—1, General Customs; 2, Particular Customs; 3, Particular Laws.

*General customs.*]—General customs are by some considered to be the common law properly so called, which then is taken in a restricted sense as excluding peculiar customs which, however, owe their origin to the *lex non scripta*. General customs are founded upon immemorial usage, whereof judicial decisions are the evidence; which decisions are preserved in the public records, explained by the books of reports and digested by writers of approved authority. The reports and books (called text-books) are now very numerous and of very various authority.

The reports are received in the courts as, in general, of binding authority, and many text-books are much relied on (c).

*Particular customs.*]—Particular customs are those which are only in use within some peculiar districts; such are the customs of gavelkind, borough-English, free-bench, copyholds, of London and of some other places.

*Gavelkind.*]—The custom of gavelkind in Kent (which also obtains in some other parts of the kingdom), ordains, among other things, that not the eldest son only of the father shall succeed to his inheritance, but all the sons alike; that though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord; and that the tenant is of age sufficient to alien his estate by feoffment at the age of sixteen (d). There are other customs, and they are divided into such as are general and such as are special.

Observe; that as to the county of *Kent*, a party may, in pleading, allege a general custom in a general manner, whilst in any other county he must state the custom specially (e).

*Borough-English.*]—The custom of borough-English prevails in certain ancient boroughs; by virtue of which the youngest son shall inherit his father as to the lands of which he is seised in fee simple or fee tail, in preference to all his elder brothers. It is called borough-*English* because, as some hold, it first prevailed in England (f). It may be observed that the law takes judicial notice of the general customs both of gavelkind and borough-English; and, therefore, there is no occasion to prove that such customs actually exist, but only that the lands

in question are subject thereto; but all other private customs must be particularly pleaded, and as well the existence of such customs shown as that the thing in dispute is within the custom alleged.

*Freebench.*.]—The custom of freebench is one by which a widow, in many boroughs, is entitled for her dower to all her husband's lands; whereas at the common law she shall be endowed for one-third part only (*g*).

*Copyholders.*.]—The customs of copyhold manors, of which every one has more or less, bind all the copyhold tenants that hold of the said manors.

*Customs of London.*.]—The customs of London with regard to trade, apprentices, widows, orphans, and a variety of other matters are somewhat peculiar; for this ancient city, being the metropolis and chief town for trade and commerce within the kingdom, it was necessary that it should have certain customs and privileges for its better government; which, though derogatory from the general law of the realm, yet being for the benefit of the citizens, and for the advantage of those who trade thereto and therefrom, have been confirmed both by judicial determination and legislative authority. If any of the customs of London be pleaded, and denied, and issue be taken thereupon, the existence of it shall be tried by a writ directed to the Mayor and Aldermen, to certify whether there is such a custom or not; and they shall make their certificate by the mouth of their recorder *ore tenus* (unless, indeed, the custom be one in which the corporation has a pecuniary interest); but the existence of all particular customs shall be tried by a jury (*h*). A late case exemplifies this; it being held that the certifi-

cate of the court of the Lord Mayor and Aldermen of the city of London, in answer to a question referred to them by the Court of Chancery, as to the right by survivorship, under certain given events, to original and accruing shares, with their accumulations, in an orphanage fund, is conclusive evidence of the custom in that respect (*i*). And it seems that, after having obtained the certificate of the Court of the Lord Mayor and Aldermen, the court would not ask them to re-consider it, unless some palpable error were apparent therein (*i*).

*Inferior courts.*]—We are next to notice the custom of holding divers inferior courts with power of trying causes in cities and trading towns; the right of holding which, when no royal grant can be shown, depends entirely on immemorial and established usage (*k*).

*Custom of merchants.*]—Lastly, under the head of particular customs, we have to consider the custom of merchants, or *lex mercatoria*, which, however, is not with much propriety classed under customs, its character not being local, nor its obligation confined to a particular district. It had its origin in the requirements and necessities of commerce. It comprises certain rules relative to bills of exchange, partnership, mercantile contracts, sale, purchase, and barter of goods, freight, insurance, and other similar mercantile matters. These customs, although they differ from the general rules of the common law, are yet ingrafted into it, and made a part of the general law of the land; and being part of the law, the judges are bound to take notice of them *ex officio* after they have been found by a jury, and, where not so ascertained in any previous trial, evidence (though there are *dicta* to the contrary) may be given to show what the actual custom of mer-

chants is; subject, however, to the remark, that evidence of the usage or custom of merchants cannot be received in any particular case to contradict the plain and express words of a contract. When the customs have been once established, they are considered of the utmost validity in all commercial transactions; for it is a maxim of law that *cuilibet in sua arte credendum est* (l). Even in matters relating to domestic trade this law frequently prevails, as, for instance, with regard to the drawing, the acceptance, and the transfer of inland bills of exchange. So also by this law the merchandises, debts, and duties of joint merchants do not survive, but go to the executor of him who dies; for *jus accrescendi inter mercatores pro beneficio commercii locum non habet* (m). And this extends to all merchants and traders, though they do not go beyond sea. In some instances, as bills of exchange and other contracts, the custom clearly extends to parties not being traders. Indeed, in no instance is the question raised as to whether or not the parties be traders or merchants (n).

*The essential parts of a good custom.*]—The existence of every particular custom must be proved before the courts will take notice of it, except, as has been already observed, in the cases of gavelkind and borough-English; and when proved, the next inquiry is into the legality of it, for it is an established rule that *malus usus abolendus est* (o). To make a particular custom good it must be—1, Ancient; 2, Uninterrupted; 3, Peaceably acquiesced in; 4, Reasonable; 5, Certain; 6, Compulsory; and 7, Consistent.

*First.*—A custom must be *ancient*; that is, it must have been used so long that the memory of man runneth not to the contrary; for if any one

can show the beginning of it, it is no good custom; and continuance of a usage must be from the beginning of the reign of Richard I., which is said to be a good title to prescription (*p*).

It is to be observed that the doctrine by which a custom is required to be immemorial is materially qualified in many cases by the 2 & 3 Will. 4, c. 71, which, as to customary and prescriptive claims of rights to be exercised over the lands of other persons (such as rights of common, or way, or the like), provides that they shall be considered as sufficiently established by an uninterrupted enjoyment as of right, in some cases for thirty, in others for twenty years, and shall not be defeated (where such enjoyment can be proved) by showing that they commenced within the time of legal memory.

*Secondly.*—A custom must have been *continued*: “*continuum dico*,” says Lord Coke, “*ita quòd non sit legitime interrupta*.” It must therefore be an interruption of the *right*, and not of the *possession* only, for that will not destroy the custom. As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is good, though they do not use it for a number of years; but if the *right* be discontinued for a day, the custom is at an end (*q*).

*Thirdly.*—A custom must have been peaceably *acquiesced* in; for a custom being the frequent repetition of an act which at first was assented to by the people of a certain place, for their mutual convenience and advantage, its being immemorially disputed is a proof that such assent is wanting.

*Fourthly.*—Custom must not be *unreasonable*; and therefore a custom may be good, though the particular reason of it cannot be assigned: for it sufficeth if no good legal reason can be assigned against it; but if it appear to be unreasonable in



itself, as being against the good of the commonwealth, or injurious to a multitude, it is bad (*r*).

*Fifthly*.—A custom must be *certain*, or at least such as may be reduced to a certainty; for an uncertain thing cannot be supposed to have had a reasonable commencement; also the uncertainty of a custom destroys the supposition of its continuance time out of mind. Thus, a custom that the tenant of a manor who *first comes* to such a place shall have all the windfalls there, or that lands shall descend to the *most worthy* of the owner's blood, is void; for it is uncertain who will *first come*, in the first case; or who shall be deemed *most worthy*, in the second. But a custom to pay a year's improved value for a fine of a copyhold estate is good, though the value of the thing is uncertain; for it may be ascertained; and, *Id certum est quod certum reddi potest* (*s*).

*Sixthly*.—A custom must be *compulsory*; and therefore a custom that every man shall contribute to the maintenance of a bridge at his own pleasure, is idle and absurd, and indeed no custom at all, for customs cannot be left to every man's option, whether he will use them or no.

*Seventhly*.—Customs must be consistent with each other. Therefore, when a man has a lawful easement or profit by prescription, time whereof, &c., another custom which is also from time whereof, &c., cannot take it away, for the one custom is as ancient as the other; as if one has by custom a way over the land of A. to his freehold, A. cannot allege a custom to stop the way; but he ought to deny the existence of the former custom (*t*).

These particular customs being in derogation of the common law, are always construed *strictly*; for it is a general rule that they shall not be *enlarged*

beyond the usage on which they are founded. Therefore, where a custom exists in commoners to dig clay on a common, if a stranger dig the clay, commoners cannot take it from him (*t*).

*Particular laws.*—The third sort of unwritten law comprises what are denominated particular laws, being such as by special custom are adopted and used in certain peculiar courts, under the superintendence and control of the common and statute law. These are the civil and canon laws.

*Civil and canon laws.*—By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprised in the institutes, the code, and the digests of the Emperor Justinian, and the novel constitutions of himself and some of his successors.

The canon law is a body of Roman ecclesiastical law, relative to such matters as that Church either has, or pretends to have, the proper jurisdiction over.

These laws bind not the subjects of England, because their materials were collected from popes or emperors; were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here; for the Legislature of England does not, nor ever did, recognise any foreign power as superior or equal to it in this kingdom, or as having the right to give law to any, the meanest, of its subjects. But all the strength that either the papal or imperial laws have obtained in the realm, or indeed in any other kingdom in Europe, is only because they have been admitted and received by immemorial usage and custom in some particular cases and some particular courts; and then they form a branch of the *leges*

*non scriptæ*, or customary laws; or else because they are in some other cases introduced by consent of Parliament, and then they owe their validity to the *leges scriptæ*, or statute law.

At the dawn of the Reformation, in the reign of King Henry VIII., it was enacted in Parliament that a review should be had of the canon law, and till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And, as no such review has yet been perfected, upon this enactment now depends the authority of the canon law in England, the limitations of which appear upon the whole to be as follows:—That no canon, contrary to the common or statute law, or the prerogative royal, is of any validity; that subject to this condition, the canons made anterior to the parliamentary provision above mentioned, and adopted into our system (for there are some which have had no reception among us), are binding both on clergy and laity; but that canons made since that period, and having no sanction from the Parliament, are, as regards the laity at least, of no force.

During the reign of James I. certain canons were made in convocation of the province of Canterbury, which were ratified by the King for himself, his heirs and successors, and about two years afterwards were adopted by the province of York, but were never confirmed in Parliament. Upon this subject much dispute has been made as to the power of convocation to make canon laws by the royal assent and approbation only. But in Mich. Term, 10 Geo. 2, in the case of *Middleton v. Croft* (v), it was solemnly adjudged upon the principles of law and the constitution, that in cases where they are

not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity; but whether and how far the said canons are obligatory upon the clergy themselves did not come in question: it seems, however, to be generally understood that they are binding in that respect.

There are four species of courts in which the civil and canon laws are permitted under different restrictions to be used:—1. The courts of the archbishops and bishops, and their derivative officers, usually called in our law, courts Christian, *curiæ Christianitatis*, or the ecclesiastical courts. 2. The military courts. 3. The courts of admiralty. 4. The courts of the two universities. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom, corroborated in the latter instance by act of Parliament, ratifying those charters which confirm the customary law of the universities (*w*).

## CHAP. II.

## THE STATUTE LAW.

[See 1 Bl. Com. p. 85—92, and ch. 2; 2 Steph. Com. p. 343—415.]

Having disposed in the preceding chapter of the unwritten law, or *lex non scripta*, we have in the present chapter to consider the subject of the *lex scripta*, or written law. This is denominated the statute law.

It will be convenient in this place to consider the subject of Parliament, as that is the body by which statutes are made.

The reason of the statute laws or acts of Parliament being styled *leges scriptæ* is, because they are originally reduced into writing before they are enacted, or receive any binding power; every such law being in the first instance formally drawn up in writing, and made as it were a tripartite indenture between the King, the Lords, and the Commons; for without the concurrent consent of all these three parts of the Legislature, no such law is or can be made; and if such a law *appears* only to have been made without this threefold concurrence, it is void (*a*).

Originally, what begun in the Commons was only termed a *petition* (for they had no power to

ordain), and what begun in the Lords was styled an *ordinance*. *Actus Parliamenti* was an act made by the Lords and Commons, and it became *statutum* when it received the King's assent.

*Origin of Parliament.*—The original or first institution of Parliaments, is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. In England this general council hath been held immemorially, under the several names of *micel-synoth*, or great council; *micel-gemote*, or great meeting; and more frequently *wittena-gemote*, or the meeting of wise men. The Parliament of England, as it now stands, was marked out so long ago as the reign of King John, A.D. 1215, in the Great Charter granted by that prince, wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally, and all other tenants in chief under the Crown, by the sheriffs and bailiffs, to meet in a certain place with *forty days'* notice, to assess aids and scutages when necessary; and this constitution has subsisted in fact, at least from the year 1266, 49 Hen. 3, there being still extant writs of that date to summon knights, citizens, and burgesses to Parliament (*b*).

*Time and manner of assembling the Parliament.*—The Parliament, as it is at present constituted, is regularly to be summoned by the King's writ or letter issued out of Chancery, by the advice of his privy council, at least forty days before it begins to sit; and it is a branch of the royal prerogative, that no Parliament can be convened by its own authority, or by the authority of any except the King's alone. It was enacted by the 16 Car. 2,

c. 1, that the sitting and holding of Parliament shall not be intermitted above three years at most; and by the 6 Will. and Mary, c. 2, this matter is reduced to greater certainty by enacting that a new Parliament shall be called within three years after the determination of the former.

*The constituent parts of Parliament.*—The constituent parts of a Parliament are, the King's majesty, sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal (who sit together with the King in one house), and the Commons, who sit by themselves in another (c).

The King and these three estates together form the great corporation or body politic of the kingdom, of which the King is said to be *caput, principium, et finis*. For upon their coming together the King meets them, either in person or by representation; without which there can be no beginning of a Parliament, and he alone has the power of dissolving them.

The *spiritual lords* consist of three archbishops and twenty-seven bishops. The *lords temporal* consist of all the peers of the realm (the bishops not being in strictness held to be such, but merely lords of Parliament), by whatever title of nobility distinguished, dukes, marquises, earls, viscounts, or barons. Some of these sit by *descent*, as do all ancient peers; some by *creation*, as do all new-made ones; others by *election*, which is the case of the sixteen peers who represent the body of the *Scotch* nobility, and the twenty-eight who are elected from among the Irish peers. Their number is indefinite, and may be increased at will by the power of the Crown. The Commons consist of all such men of any property in the kingdom as have not seats in

the House of Lords; every one of which has a voice in Parliament, either personally or by his representatives. The number of *English* representatives is five hundred (from which, however, two must be deducted on account of one borough, Sudbury, having been disfranchised); of *Scotch* fifty-three, of *Irish* one hundred and five, in all (when complete) six hundred and fifty-eight (*d*).

*Power of Parliament.*—The power and jurisdiction of Parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding laws concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations, and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal.

*Speaker.*]—For the dispatch of business, each House of Parliament has its speaker. The Speaker of the House of Lords, whose office it is to preside there, and manage the formality of business, is the Lord Chancellor, or keeper of the King's great seal, or any other appointed by the King's commission; and, if none be so appointed, the House of Lords, *it is said*, may elect. The Speaker of the House of Commons is chosen by the House, but must be approved by the King (*e*).



*Qualifications of members.*—As to who may or not sit in the House of Commons as members, it may be observed that no peer (except Irish peers not sitting in the Lords) or person under twenty-one years of age, clergyman, judge, metropolitan police magistrate, pensioner under the Crown, Government contractor, person holding any new office or place of profit under the Crown created since 1705, alien, or person attainted of treason or felony, or outlawed on criminal prosecution, is admissible (*f*); with these exceptions every person (even Roman Catholics) may be returned and sit as a member of the House of Commons, provided, in case of a county member, that the party have an estate of the clear yearly value of £600 in lands, &c., and in the case of a member for a city or borough, that he have lands of the value of £300. This qualification is not required for the members of the universities, or for the eldest son or heir apparent of a peer, or of any person qualified to serve for a county.

*Qualifications of electors for counties.*—We can only shortly notice the subject of the qualifications of persons claiming to be voters at elections. And first of electors for knights of the shires. The elector must have an estate of freehold or copyhold for life at the least, or a leasehold, as after mentioned, or be an occupying tenant of a certain amount. A trustee or mortgagee, if in actual possession, may vote, otherwise the right is in the mortgagor or *cestui que trust* (*g*).

We will now consider the *value* of the estate which an elector for a county must have. As to *freeholds*: With respect to all freeholders of inheritance, and also with respect to all freeholders for life, provided these last shall be in actual and *bond fide* occupation, or shall have acquired their

freeholds by marriage, marriage settlement, devise, or promotion to any benefice or office, the qualification is the same—40s. by the year at least above all charges. But with respect to other freeholders (with certain limited exceptions), the act has now raised their qualification to the clear yearly value of not less than £10 above all rents and charges payable out of, or in respect of, the same (*h*).—As to *copyholds*, or other property not of freehold tenure: Persons seised of such property are qualified, if it be of the clear yearly value of not less than £10 over and above all rents and charges payable out of or in respect of the same.—As to *leaseholds*: Every person entitled, as a lessee or assignee, to any lands or tenements, of whatever tenure, for the unexpired residue of a term, is qualified, if the term was originally not less than sixty years (whether determinable on life or not), by a clear yearly value of £10 or upwards, if it was originally not less than twenty years (whether so determinable or not), by a clear yearly value of £50 or upwards over and above all rents and charges payable out of or in respect of the same. With respect, however, to a sub-lessee, or an assignee of a sub-lessee, it is required that, in order to vote in respect of such term of sixty or twenty years, he should be also in actual occupation of the premises.—As to the *occupation as tenant*, under liability to yearly rent: Every person is qualified by the act who shall occupy as tenant any lands or tenements for which he shall be *bond fide* liable to a yearly rent of not less than £50 (*i*).

*Qualifications of electors for cities and boroughs* ]  
—We have stated the qualifications of electors for knights of the shires, and it now remains to notice

those for citizens and burgesses, which differ greatly from the former. Under the new system established by the Reform Act (2 Will. 4, c. 45), the rights of voting consist, first, of a new right conferred by the act; secondly, of old rights reserved (under certain conditions) in perpetuity; and thirdly, of old rights reserved (under certain conditions) for a time, which last are every day becoming of less importance.

The new right or qualification conferred by the act is in respect of the occupation within the borough (as owner or tenant) of any house or other building, being either separately of the clear yearly value of not less than £10, or of that value jointly with land in the same borough, occupied by the same party as owner, or as tenant under the same landlord. The party must have occupied for twelve months, have paid all the poor rates and assessed taxes, and have resided six months within the borough, or within seven statute miles thereof. The old rights reserved in perpetuity are, as a burgess or freeman, and (in the City of London) a freeman and liveryman, and (in other towns being counties corporate) a freeholder or burgage tenant (*j*). The old rights reserved for a time are all such rights of voting as formerly existed in boroughs (in respect of whatever qualification), and not included among those which the act retains in perpetuity. Among these is comprised the right of inhabitants paying scot and lot, of inhabitant householders, of inhabitant potwallers (cookers of their own diet), of inhabitants generally, and of freeholders and burgage tenants in cities and boroughs not being counties of themselves. All such rights, as they existed according to the custom of the several places, are retained for the life of the parties who were entitled on the 7th of June, 1832, the day on which the act received the royal assent (*k*).

*Registration.*—Such is a cursory view of the qualifications of electors, and it must be added that, before ever such qualified persons can vote, they must be *registered* in the manner pointed out in the Reform Act, and the 6 Vict. c. 18 (*l*).

Some persons, in addition to those before mentioned, are expressly disqualified to vote; such are lunatics, idiots, minors, persons convicted of perjury or bribery, and females, whether married or single. So metropolitan police magistrates (within their jurisdiction), or persons employed about the duties of excise, customs, stamps, salt, window or houses, or post-office. So no person can vote for a city or borough who has received parochial relief within twelve months (*m*).

*Privileges of Parliament.*—There are many privileges attached to members of either House of Parliament, the chief of which are those of freedom of speech and person. As to this latter, a peer is (by virtue of his dignity) exempt from arrest in civil cases at all times, and a member of the House of Commons (by the privilege of Parliament), not only while the House is sitting, but for such a period before the first meeting, and after the dissolution of Parliament, as may enable him conveniently to come from, and return to, any part of the kingdom. The immunity continues also for forty days after every prorogation, and forty days before the next appointed meeting, which is now in effect so long as the Parliament subsists, it seldom being prorogued for more than four score days at a time (*n*). So greatly is this privilege favoured, that it has been held that, inasmuch as a member of either House of Parliament is privileged from arrest, a writ of *capias* against him is irregular, and will be set aside, although, in the case of a member of the Lower House, the writ be not intended to be put into exe-

cution till his privilege expires, nor although, in either instance, no proceedings are contemplated against the person of the member, but the writ is only sued out as part of process to outlawry (*o*).

Actions may be freely brought against peers or members of the House of Commons or their servants; and, for the benefit of commerce, it is provided, by 6 Geo. 4, c. 16, ss. 10, 11, that if a trader, being a member of Parliament, and personally served with a summons in an action for recovery of a debt of such amount as shall be sufficient to support a fiat in bankruptcy, shall not, within one calendar month, comply with the process; or if, being personally served with a preremptory order from a court of equity to pay any sum of money, he shall neglect to do so, he shall be deemed to have committed an act of bankruptcy (*p*).

*Statutes.*]—For an admirable sketch of the method of passing a statute, the reader is referred to 1 Black. Com. p 181—185; also to 2 Steph. Com. 403—410. When a bill has received the royal assent, it is then, and not before, a statute or act of Parliament. This statute or act is placed among the records of the kingdom, there needing no formal promulgation to give it the force of a law, as was necessary by the civil law with regard to the Emperor's edicts; because every man, in judgment of law, is party to the making of an act of Parliament, being present thereat by his representatives. However, a copy thereof is usually printed from the King's press, for the information of the whole land. An act of Parliament thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay, even the King himself,

if particularly named therein (*q*); and it cannot be altered, amended, dispensed with, suspended or repealed, but in the same forms, and by the same authority of Parliament; for it is a maxim in law, that it requires the same strength to dissolve as to create an obligation. It is true, it was formerly held, that the King might in many cases dispense with penal statutes; but now, by 1 W. and M. st. 2, c. 2, it is declared that the suspending or dispensing with laws by legal authority, without consent of Parliament, is illegal (*r*).

*Time of operation of statute.*—A statute begins to operate from the time when it receives the royal assent, unless some other time be fixed by the act itself for the purpose. The rule on this subject was formerly different, for at common law every act of Parliament, which had no provision to the contrary, was considered, as soon as it passed (that is, received the royal assent), as having been in force retrospectively from the first day of the session of Parliament in which it passed, though in fact it might not have received the royal assent, or even been introduced into Parliament, until long after that day. This doctrine, however, no longer prevails, it being expressly provided by the 33 Geo. 3, c. 13, that where no other direction is given, every act shall be considered as commencing from the date endorsed upon it as the date of its receiving the royal assent—a manifest improvement on the former law, though it has been doubted (and with reason) whether even the new rule is placed upon the right basis, and whether some fixed and reasonable period ought not always to be interposed between the passing of an act and the time of its coming into operation, so as to give the subjects of the realm an opportunity of becoming

acquainted with its provisions. The rule, it will be observed, is laid down with an exception of the case where the period of commencement is otherwise fixed by the statute itself; for by force of an express provision, or even by necessary construction from the nature of the enactment, the operation of a statute may be either postponed on the one hand, or have a retrospective relation on the other, so as to affect rights which had vested before it received the royal assent, or transactions which had before then taken place (*s*).

It now remains to notice the different kinds of statutes, and point out some general rules with regard to their construction.

Statutes are either general or special; that is, they are either public or private—a distinction first made in the reign of Richard III.

*Public Statutes.*—A general or public act is an universal rule that regards the whole community; and of this the courts of law are bound to take notice judicially and *ex officio*, without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. It is in this respect that public differ from private acts, for these last must, unless there be a special clause to the contrary, be formally shown and pleaded.—The distinction as to a public and private act is sometimes a question of difficulty, and it does not follow that the classification by the Queen's printer of an act as a public or a private one is conclusive (*t*). It must be borne in mind that a statute may be public in one part and private in another (*t*). Whether an act of Parliament is to be deemed a public act, binding on all the Queen's subjects, or merely a private act, depends upon the nature and substance of the case, and not upon the technical

consideration whether the act does or does not contain a clause declaring that it shall be deemed to be a public act (*u*). Although the words of a statute are particular, yet if the intent be general, it is a public statute; and on the contrary, if the intent be particular, it shall, notwithstanding the words are general, be deemed a private statute.

*Private statutes.*—Special or private acts are rather exceptions than rules, being those which only operate upon particular persons or private concerns. Thus, a statute which concerns only a certain species of spiritual persons, as the bishops, or an individual of a certain species, as a particular bishop, is a private statute. Formerly, in many statutes which would otherwise have been deemed private acts, there was a clause by which they were declared to be public statutes; but they did not thereby derive any additional weight or authority, and were still to be construed as private acts. Now private acts are not made public, but a clause is generally inserted to the effect that they shall be printed by the Queen's printer, and that a copy so printed shall be admitted as evidence of the acts. Some private acts are local, as affecting particular places only; others personal, as confined to particular persons. Thus we have public general acts, public local and personal acts, and private local and personal acts. However, for the convenience of reference, acts are now divided by the Queen's printer into public general acts, local and personal acts declared public, private printed acts, and private acts not printed (*v*).

Statutes, also, are either *declaratory* of the common law, or *remedial* of some defects therein.

*Declaratory statutes.*—Declaratory statutes are where the old custom of the kingdom is almost fallen



into disuse or become disputable ; in which case the Parliament has thought proper *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is.

*Remedial statutes.*]—Remedial statutes are those which are made to supply such defects, and abridge such superfluities in the common law as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned judges, or from any other cause whatsoever.

And this being done, either by *enlarging* the common law where it is too narrow, or by *restraining* where it is too lax and luxuriant, has occasioned another subordinate division of remedial acts of Parliament into enlarging and restraining statutes, which terms sufficiently explain themselves.

Other denominations have also been given to statutes from the different manners in which they are penned, some of them being called affirmative statutes, and others negative statutes.

So, also, wherever an act of Parliament imposes a penalty or inflicts a punishment, that is called a penal statute ; and as a statute may be public as to one part, and private as to another (*w*), so, also, it may be remedial in one part, and penal in another.

*Construction of statutes.*]—The construction of acts of Parliament is founded upon this general rule : that remedial statutes are to be expounded liberally, and penal statutes are to be construed strictly. In construing an act, the judges, with whom alone the power of construing statutes resides, are to consider the old law, the mischief, the remedy, and the true reason of the remedy, that is, how the

common law stood at the making of the act; what the mischief was for which the common law did not provide; and what remedy the Parliament hath provided to cure this mischief; and are so to construe the act as to suppress the mischief and advance the remedy. The general rule for the construction of acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such a case, best declare the intention of the Legislature (*x*).

The following seem to be the most general rules upon this subject—1. An affirmative statute does not take away the common law, and the party may make his election to proceed upon the statute or at the common law. 2. A negative statute completely takes away the common law, so that it cannot afterwards be made use of upon the same subject (*y*). 3. Words and phrases, the meaning of which in a statute has been ascertained, are, when used in a subsequent statute, to be understood in the same sense. Thus, where the 23 Hen. 6 says the sheriff *may* take bail, the judges construed it to mean *shall* take bail; and so where a person was indicted for disobeying the 14 Car. 2, c. 12, which enacts that overseers *may* make a rate, and an exception was taken that the act did not require them to do it, the court over-ruled the exception (*z*). 4. In the construction of one part of a statute, every other part ought to be taken into consideration; but the title of a statute is not to be regarded in construing it, because this is no part of the statute: the preamble, however, must be considered, for it is a key to open the minds of the makers as to the mischiefs which are

intended to be remedied; but this rule must not be carried so far as to restrain the general words of the enacting clause to the particular words of the preamble; although strong words in the enacting part of a statute may extend it beyond the preamble (*a a*). 5. A saving in a statute which is repugnant to the purview of it is void, but the purview may be qualified and restrained by the saving. It has been held that a proviso, which, on the face of the act, is not inconsistent with the other enactments of it, is not to be limited in its effect by reason of local circumstances, not apparent on the face of the act, causing such inconsistency. But such a proviso will not limit an express authority given by the act (*a b*). 6. If divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them; for all statutes *in pari materia* are to be construed as one law. 7. If a statute that repeals another is itself afterwards repealed, the first statute is hereby revived, without any formal words for that purpose. 8. Acts of Parliament derogating from the power of subsequent Parliaments are not binding. 9. Acts of Parliament that are impossible to be performed are of no validity (*a c*); and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void; but when the words of a statute are doubtful, general usage may be called in to explain them.

## CHAP. III.

THE COUNTRIES SUBJECT TO THE LAWS  
OF ENGLAND.[1 Bl. Com. *Introd.* s. 4; 1 Steph. Com. *Introd.* s. 4.]

The municipal laws of England do not by the *common law* extend either to Wales, Scotland, Ireland, the Isle of Man, the Islands of Jersey, Guernsey, Sark, Alderney, and their appendages, or to the more distant dependencies of the mother country, but are confined to the territory of England only. Custom, however, in some instances, and the Legislature in many others, have extended these laws in a greater or less degree to the several places which form the empire of Great Britain, as will be presently shown.

*England.*—England now comprehends Wales and Berwick, and also part of the main or high seas; for thereon the Admiralty Courts have jurisdiction. This main sea begins at the low water mark; but between the high water mark and the low water mark, where the sea ebbs and flows, the common law and the Admiralty have *divisum imperium*; an

alternate jurisdiction: one upon the water when it is full sea, the other upon the land when it is an ebb.

England is divided into an ecclesiastical and temporal state.

*Ecclesiastical divisions of England.*]—The ecclesiastical state is divided into two archbishoprics or provinces, viz., Canterbury and York. Each archbishop has within his province suffragan bishops of every diocese, some of which are of ancient foundation, four were founded by Henry VIII. out of the dissolved monasteries, and some have been erected by recent statutes (*a*).

Every province is divided into dioceses, every diocese into archdeaconries, every archdeaconry into rural deaneries, and every deanery into parishes; but there are some places that are *extra parochial*.

A province is the jurisdiction of an archbishop; a diocese is the circuit of every bishop's jurisdiction; an archdeaconry is the circuit of the archdeacon's jurisdiction, as a deanery is that of a rural dean; and a parish is that circuit of ground on which the souls under the care of one parson or vicar do inhabit (*b*).

*Temporal state.*]—The temporal state is divided into counties, those counties into hundreds, and the hundreds into tithings or towns.

A county (*comitatus à comitando*, from accompanying together, particularly at the assizes and sessions held for the county; or, as some say, *à comitando principem*) or shire is a certain circuit or part of the kingdom governed by a yearly officer called a sheriff, or shire reeve, under the king; for a county cannot be without a sheriff. The king, by his letters patent, may make a county with its two

courts, the town and county court: and that no part should be exempt from the authority of the sheriff, every parcel of land lies in some county (c). Every county is, as it were, an entire body by itself; so that, regularly, an inquest or jury shall not take notice of anything done in another county. The number of counties in England and Wales have been different in different times: at present there are forty in England and twelve in Wales. Three of these counties, *Chester*, *Durham*, and *Lancaster*, are called counties palatine; the two former are such by prescription, or immemorial custom, the latter by creation. Counties palatine are so called *à palacio*, because the owners thereof, the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster, had in these counties *jura regalia* as fully as the King has in his palace; *regalem potestatem in omnibus*. By 27 Henry 8, c. 2, and 14 Eliz. c. 6, these powers of the owners of counties palatine were abridged, and they have recently been more assimilated to the rest of England. Thus, by the 11 Geo. 4, and 1 Will. 4, c. 70, ss. 13, 14, the jurisdiction of the Court of Session of the county palatine of Chester was abolished, and the county subjected in all things to the jurisdiction of the superior courts at Westminster. By the 4 & 5 Will. 4, c. 62, the practice and proceedings in civil actions in the Court of Common Pleas at Lancaster were regulated and made conformable in most particulars to that of the superior courts just mentioned; and by the 2 Vict. c. 16, similar provisions have now been made with respect to the Court of Pleas at Durham (d).

Some cities and towns corporate also are counties of themselves, as London, York, Canterbury, Norwich, Worcester, &c.

A hundred was so called, because it was originally

the jurisdiction of ten tithings, or an hundred families, dwelling in some neighbouring towns.

The people who live in a hundred are called hundredors; and these hundreds continue to this day, to some purposes; but their jurisdiction is in general transferred to the county court, except indeed those which were formerly annexed to the Crown, and have been granted to great men in fee, and so remain in nature of a franchise, and have return of writs; and in these franchises or liberties the sheriff cannot meddle by his ordinary authority; but all grants made since the 14 Edw. 3, c. 9. of bailiwicks of hundreds, except such as then were of estates in fee, are void. In some of the more northern counties, the hundreds are called wapentakes, rapes, ridings. There is a chief constable, and a bailiff of every hundred, to execute the orders of the sheriff, justices, &c. (e).

A town, villa, or vicus, was a precinct anciently containing ten families, upon which account they are sometimes called tithings. These tithings are said to have had each of them originally a church and celebration of divine service, sacraments, and burials; though that seems to be rather an ecclesiastical than a civil institution. The word town, or vill, is indeed, by the alteration of times and language, now become a generical term, comprehending under it the several species of cities, boroughs, and common towns.

A city is a town incorporated, which is, or hath been, the see of a bishop; and though the bishoprick be dissolved, as at Westminster, yet still it remaineth a city (f).

A borough is a town, either corporate or not, that sendeth burgesses to Parliament, though the word was originally used in a more extensive sense, and is so now in the Municipal Corporation Acts.

There are also other towns, which are neither cities nor boroughs; some of which have the privileges of markets, and others not; but both are equally towns in law. To several of these towns there are small appendages belonging, called hamlets, which are sometimes under the same administration as the town itself, and sometimes governed by separate officers; in which last cases they are, to some purposes in law, looked upon as distinct townships. Towns originally contained but one parish and one tithing; though many of them now, by the increase of inhabitants, are divided into several parishes and tithings; and sometimes where there is but one parish, there are two or more vills or tithings (*h*).

*Wales.*]—The principality of Wales was incorporated and united to the kingdom of England by 27 Hen. 8, c. 26, and all persons born within the said principality are thereby admitted to have, enjoy, and inherit, all and singular the freedoms, liberties, rights, privileges, and laws of England, in as full a manner as other the King's subjects; and all lands, manors, tenements, rents, reversions, services, and other hereditaments within the said principality, or within any particular lordship, parcel thereof, shall be inheritable after the English tenure, and not after any Welsh tenure; and that the laws, ordinances, and statutes of the realm of England for ever, and none other laws, ordinances or statutes, shall be had, used, practised, and exercised in Wales. This statute, which contains a great variety of regulations concerning this principality, too numerous even to abridge, is confirmed by the statute of 34 & 35 Hen. 8, c. 26, which ordains, that the said principality of Wales shall be divided into twelve shires; and in short



reduces it into the same order in which it stands at this day, differing from the kingdom of England in only a few particulars, and these too in the nature of privileges, the chief of which was in having courts within itself, called courts of great session, independent of the process of Westminster-hall. But these courts are now (by 1 Will. 4, c. 70) abolished, and assizes are now held in Wales for the trial of all matters civil and criminal in the same manner as in England, and the courts at Westminster have jurisdiction just the same as in any part of England proper. Thus Wales is to all intents and purposes a portion of England (*i*).

*Scotland.*] — Scotland continued an entirely separate and distinct kingdom, notwithstanding the accession of King James to the throne of England, until the reign of Queen Anne; in the fifth year of whose reign, articles of union were agreed on by commissioners appointed for that purpose by both kingdoms; which treaty the Legislature ratified by the statute of 6 Ann. c. 8. These articles are twenty-five in number. The first directs, that the two kingdoms shall upon the 1st May, 1707, and for ever after, be united into one kingdom, by the name of Great Britain. Secondly, that the succession to the monarchy of the United Kingdom of Great Britain, after the death of Queen Anne, shall be and continue to the Princess Sophia, Electress of Hanover, and the heirs of her body, being Protestants. Thirdly, that the United Kingdom be represented by one and the same Parliament. Passing over the intermediate articles as comparatively unimportant, we come to the nineteenth article, by which the Court of Session, or College of Justice, shall after the union, and notwithstanding thereof, remain in all time coming

within Scotland, as it is now constituted by the laws of that kingdom, subject nevertheless to such regulations for the better administration of justice, as shall be made by the Parliament of Great Britain. By the twenty-second article it is provided that of the peers of Scotland at the time of the union, sixteen shall be the number to sit and vote in the House of Lords; and forty-five the number of the representatives of Scotland in the House of Commons of the Parliament of Great Britain, which, however, has since been augmented to fifty-three (j). By the twenty-third article, the sixteen peers shall have all privileges of Parliament; and all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the union, and shall have all privileges of peers, except sitting in the House of Lords, and voting on the trial of a peer (k).

By 5 Anne, c. 5, the Church of Scotland and the four universities of that kingdom are established for ever; and all succeeding sovereigns are to take an oath inviolably to maintain the same. By 5 Anne, c. 6, the Act of Uniformity of 13 Eliz. c. 4, and 13 Car. 2, c. 10, except as the same had been altered by Parliament at that time, and all other acts then in force for the preservation of the Church of England, are declared perpetual; and it is stipulated, that every subsequent King and Queen shall take an oath inviolably to maintain the same with England, Ireland, Wales, and the town of Berwick-upon-Tweed. And it is enacted that these two acts "shall for ever be observed, as fundamental and essential conditions of the union."

*Berwick-upon-Tweed.*]—The town of Berwick-upon-Tweed was originally part of the kingdom of Scotland; but it was ceded by Edward Baliol to

King Edward III., and is now clearly part of the realm of England, being represented by burgesses in the House of Commons, and bound by all acts of the British Parliament, whether specially named or otherwise (*l*).

*Ireland.*—The union of Ireland took place in the reign of King George III., and from the date of that act the nation is denominated the United Kingdom of Great Britain and Ireland; the Parliament, that of the United Kingdom of Great Britain and Ireland; the subjects of Ireland have, by this alliance, become, in every respect entitled to the same privileges as those of Great Britain. Their laws and courts are to remain the same as they then were, subject to the alterations of the united Parliament (*m*).

It is provided that the lords spiritual of Ireland by rotation of sessions, and twenty-eight lords temporal of Ireland, elected for life by the peers of Ireland, shall sit in the House of Lords, and one hundred commoners (to whom five more have now been added by a recent act of Parliament), shall be the number to sit in the House of Commons on the part of Ireland; that a peer of Ireland not elected one of the twenty-eight may sit in the House of Commons, but while so sitting shall not be entitled to privilege of peerage, or to be elected one of the twenty-eight, or to vote at such election; and that all the lords spiritual and temporal of Ireland (except those temporal peers who may be members of the House of Commons) shall have all privilege of peerage as fully as those of Great Britain; the right of sitting in the House of Lords (with its attendant privileges) only excepted (*n*).

It may be mentioned in conclusion, that since the union all acts of Parliament extend to Ireland,

whether expressly mentioned or not, unless that portion of the United Kingdom be expressly excepted, or the intention to except it be otherwise plainly shown (*o*).

*Other dependencies.*] — The islands of Man, Jersey, Guernsey, Sark, Alderney, and other appendages, are governed by their own laws. The inhabitants are not bound by our acts of Parliament, except expressly named therein; nor can process issue there from the courts of Westminster, but prerogative and mandatory writs run into these islands (*p*).

*Colonies.*] — It is well known that this country possesses many valuable colonies in various parts of the world, as to which it is to be observed that they are no part of the mother country, but distinct (though dependent) dominions. They were either gained by conquest or treaty, or they were acquired by right of occupancy only, that is, by finding them desert and uncultivated, and peopling them from the mother country.

In conquered or ceded countries they have already laws of their own; these laws remain in force until changed by competent authority, and the common law of England, as such, has no allowance or authority there: while, on the other hand, it has been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birth-right of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the

general rules of inheritance, and of protection from personal injuries; the artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force.

Though it is competent to Parliament to legislate for the colonies, yet a colony is not considered as affected by acts of Parliament passed after its acquisition, and while it is subject to other legislative authority (whether that of the sovereign in council, or of a local council or assembly), unless it be mentioned in the act by name or by general description; such as "the colonies" or "the West Indies," or unless the act be in its nature obviously intended to affect all our possessions. But in a colony acquired by occupancy, acts passed before its acquisition come into force immediately upon that event, as part of the general law of England (as to all provisions at least not unsuitable to its social circumstances); though it is otherwise in the case of a colony won by conquest or cession, which remains (as we have seen) subject to its own pre-existing laws, and is not in general affected by statutes of the United Kingdom passed before its acquisition (q).

## CHAP. IV.

## PERSONS AS INDIVIDUALS.

[1 Black. Com. ch. 1; 1 Steph. Com. B. 1, p. 125—140.]

The objects of the laws of England being the preservation of men's persons and properties from civil injuries and criminal violence, a natural division is formed into the four following subjects; namely—1st, persons; 2nd, property; 3rd, civil injuries; and 4thly, crimes and misdemeanours.

Persons are to be considered in their natural, and in their relative or civil capacities. A person in his civil capacity is every man or woman; in which the law takes notice of life, sex, age, health, liberty, and reputation.

*Life.*—Life begins when an infant stirreth in the womb. The birth is usually at the end of nine solar months after conception, reckoning thirty days to the month: therefore, if a child be born within nine months, or rather, within forty weeks after the death of the husband of its mother, it is held to be legitimate; but there is no exact time fixed by law beyond which if the child be born the law determines it to be illegitimate, but it shall be found by

a jury on proper evidence (*a*). An infant *en ventre de sa mere* may be supposed to be born to many purposes. A surrender to such an infant is good; so is a devise, or a guardianship, under the statute 12 Car. 2, c. 24; and by 10 & 11 Will. 3, c. 16, posthumous children are enabled to take estates, as if born in their father's life-time, though there be no estate limited to trustees after the decease of the father, to preserve contingent remainders, the necessity of which, indeed, has lately been taken away in other cases. So a bill in equity may be filed on behalf of such an infant, and an injunction to restrain waste being committed on its property will be granted (*b*).

*Sex.*—Sex is *male* or *female*; for an hermaphrodite, which is both male and female, shall be accounted in law as of that sex which most prevails. The word man includes both man and woman; and a virgin is included under the denomination of woman.

*Age.*—The age of male or female is twenty-one years; and it is not material at what hour of the day the birth takes place, for the law does not admit any fraction of a day. An infant attains his full age on the completion of the day which precedes the twenty-first anniversary, but still he may do any act which he is entitled to do at full age during any part of such day, for, as before stated, the law makes no fraction of a day for such a purpose (*c*).

A man hath divers ages to several purposes. At twelve he ought to take the oath of allegiance; at fourteen, he may consent to marriage, choose his guardian, is supposed to be at years of discretion, and if so, in fact, might formerly have made a will

of his personal estate ; and at twenty-one may alien his lands, goods, and chattels.

A woman had formerly seven ages to several purposes, but now that law is altered. At nine years of age she may have dowry ; at twelve she may consent to marriage ; at fourteen she is supposed to be at years of discretion, may choose a guardian ; and at twenty-one may alienate her land.

*Infants.*.]—Before the age of twenty-one a man or woman is called an infant or minor ; and before such age, any deed or other writing made by them may be avoided ; in matters of *fact*, either within age or at full age ; but if they be matters of record, they must be avoided during minority ; as to conveyances by infants, there is this distinction, that some are void, whilst others are merely voidable. This was an ancient doctrine, and was fully settled in the famous case of *Zouch v. Parsons* (3 Burrows, 1794), where Lord Mansfield laid it down that where a deed which takes effect by delivery, is executed by an infant, it is voidable only, and not void. This decision has been strongly disapproved of by Mr. Preston and others, but it is clearly good law, and has very recently been acted on as such (*d*). An infant may contract for, and even bind himself by single bond, to pay for necessities, as meat, drink, physic, apparel, instruction for himself, wife, children, and family ; but if he enter into a bond with a *penalty* for the payment of any of these necessities, the bond shall not bind him : and if he borrows money to buy, or pay a debt for necessities, and applies it accordingly, he is not liable at law, because he might have wasted it ; but he is liable in equity, and the lender of the money stands in the place of the creditor for



necessaries; or if, after coming of age, he devise lands in trust for the payment of his debts, a debt for necessaries, though contracted during his minority, is within the trust (*e*).

An infant defendant is liable to costs at law, but not an infant plaintiff: for any one may commence a suit in his name as next friend, or, as it is called in the law French, *prochein ami* (*f*). An infant is bound by all conditions, charges, and penalties in an original conveyance, whether he comes to the estate by grant or descent. The law gives an infant capacity to purchase, or contract, without consent of any other, for it is intended for his benefit, and the vendee is absolutely bound by this contract; but the infant at his full age may either agree to or perfect it, or, without any cause alleged, waive or disagree to the same; and so may his heirs after him, if he has not confirmed it (*g*). This must be confined to a perfect purchase; for an infant cannot compel, by a suit in equity, the specific performance of a contract for the purchase of real property, because in such a case the remedy ought to be mutual, and it is not in the case of an infant, as the courts cannot compel him to perform the contract on his part, either by paying the money or executing a conveyance (*h*).

*Health.*]—Under this head are included those injuries to which both the body and the mind are liable. Injuries to the body may be committed by selling bad provisions or wine, or by exercising a noisome trade, which infects the air, or by the neglect or unskilful management of a physician, surgeon, or apothecary (*i*). Health, with respect to the mind, includes the consideration of—1st, idiotcy; 2nd, madness; 3rd, lunacy: 4th, intoxication.

*Idiots and lunatics.*]—An idiot is a natural fool, or one of unsound mind and memory from his nativity; for if he hath any spark of reason, the law in its humanity will hope that time may restore him to his perfect understanding, and therefore will not account him an idiot or natural fool; but if he hath no signs of sanity, the custody of him and his lands are given to the King by the 17 Edw. 2, c. 9, the statute *de Prærogativâ Regis*, as the general conservator of his people, in order to prevent the idiot from wasting his estate, and reducing himself and his heirs to poverty and distress. But whether a man is an idiot or not must be tried by a jury of twelve men. A man is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters; but a man who is born deaf, dumb, and blind, is looked upon by the law as in the same state with an idiot; he is to be supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas. Idiots, and all persons of non-sane memory, are totally disabled either to convey or purchase, except *sub modo* only, for their conveyances and purchases are voidable, though not actually void (*j*). A madman is he who loses his understanding by grief, sickness, or other accident. A lunatic, or *non compos mentis*, is properly one who has lucid intervals, sometimes enjoying his senses and sometimes not; and that frequently, as some imagine, depending upon the changes of the moon. But under the general name of *non compos mentis* are comprised not only lunatics but madmen, or persons under frenzies, or who lose their intellects by disease, those that grow deaf, dumb, and blind, not being born so, or such, in short, as are adjudged by the Court of Chancery incapable of conducting their own affairs. To these also, as

well as idiots, the King is guardian; but as the law always imagines these accidental misfortunes may be removed, the Crown constitutes a trustee to protect their property.

*Commission of lunacy.*—By the old law, in the case of an idiot, a writ *de idiota inquirendo* issued, but now in fact a commission issues as in the case of a lunatic, and it is seldom that the party is found an idiot from the time of his birth. To prove a man a lunatic, the Lord Chancellor grants a commission in the nature of a writ *de lunatico inquirendo*, to inquire into the party's state of mind. If the party be found *non compos mentis*, the care of his person, with a suitable allowance for his maintenance, is usually committed by the Lord Chancellor to some friend, who is then called his committee.

*Lunatic asylums.*—For the care of insane persons, lunatic asylums have been erected in various parts of the country. Some are public and others are private asylums. Public lunatic asylums have been erected under various statutes, the principal of which was the 9 Geo. 4, c. 40, which has now been repealed by the 8 & 9 Vict. c. 126, which enacts that justices of the peace of every county and borough, not having a lunatic asylum, are to provide one, or unite with some other. By the 10 & 11 Vict. c. 43, this provision is further carried out and explained. These asylums are mainly designed to receive the insane paupers or insane criminals of the county—classes of persons for whom it may be said in general that there is no other resource, particularly since the recent provision of the Poor Law Amendment Act, 4 & 5 Will. 4, c. 76, s. 45, by which it is made penal to confine insane persons,

who are dangerous, more than fourteen days in any workhouse. By the 1 & 2 Vict. c. 14, it is provided, as to lunatics meditating crime, that if any person shall be discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing an indictable crime, and two justices (assisted by a medical man) shall be satisfied that he is insane, or a dangerous idiot, they may order him to be conveyed to the county lunatic asylum; or, if there be none in that county, then to some public hospital or house duly licensed for reception of insane persons. And by 3 & 4 Vict. c. 54, it is moreover enacted, with respect to insane criminals, that if any person in custody under sentence of death, transportation, or imprisonment, or under any charge, or under any other civil process, shall appear to be insane, and his insanity shall be certified by any two justices of the peace of the county, city, borough, or place where such persons shall be confined, and also by two physicians or surgeons, a principal secretary of state may direct his removal to some county lunatic asylum, or other proper receptacle for insane persons, there to remain until a like certificate has been given that his reason is restored.

These public lunatic asylums are also for the reception of insane patients who are neither paupers nor criminals, or who, being paupers, belong to other counties or places.

As to private lunatic asylums, it is provided that every such place must be licensed by the commissioners in lunacy or justices at quarter sessions, and no person is to be there received without a written order from the person sending him, and a medical certificate of two physicians, surgeons, or apothecaries, in such form prescribed by the acts, nor can even a single insane person be legally received or

taken charge of in an unlicensed house without such order and certificate, unless by his guardian or relative acting gratuitously, or by his committee appointed by the Lord Chancellor or other person intrusted by the Crown with the care of lunatics. But in the case of pauper lunatics the order is to be under the hand of one justice, or an officiating clergyman with one of the overseers or the relieving officer of the parish or union, and the medical certificate is to be signed by one physician, surgeon, or apothecary (*l*).

*Drunkard.*]—A drunkard is one who by his own acts deprives himself of memory and understanding for a time. This kind of *non compos mentis* shall give no privilege or benefit, but what hurt he doth his drunkenness shall aggravate. However, a defendant in an action may set up his own intoxication as a defence, if it were known to and taken advantage of by the plaintiff, because this is a fraud (*m*).

*Liberty—habeas corpus.*]—The personal liberty of the subject consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. By Magna Charta, no freeman shall be taken and imprisoned but by the lawful judgment of his equals, or by the law of the land. By the Petition of Right, 3 Chas. 1, no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16 Car. 1, c. 16 (which, however, only furthers the common law right), if any person be restrained of his liberty, by order or decree of any illegal court, or by command of the King's Majesty

in person, or by warrant of the council-board, he shall, upon demand of his counsel, have a writ of *habeas corpus* to bring his body before the Court of King's Bench or Common Pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by the *Habeas Corpus* Act, 13 Chas. 2, c. 2 (amended and enforced by 56 Geo. 3, c. 100), a prisoner may have a *habeas corpus* from any judge in the vacation, returnable immediately (unless committed for treason or felony, plainly and specially expressed in the warrant, or imprisoned for debt, or by process in any civil suit); and upon his being brought up, such judge shall discharge him upon bail (if the offence be bailable), to appear at the next ensuing court where the offence is cognisable; and all persons committed for treason or felony who shall petition in open court, the first week of the term, or the first day of the sessions after such commitment, to be brought to trial, and who shall not be indicted some time in such term or session, shall, upon motion the last day of the term or session, be let out upon bail, unless it appear upon oath that the King's witnesses could not be produced that term or session; and if such person, upon such prayer, shall not be indicted and tried the second term or session after commitment, they shall be discharged (*n*). And, lest this act should be evaded by demanding unreasonable bail or sureties for the prisoner's appearance, it is declared by 1 Will. and Mary, st. 2, c. 2, that excessive bail shall not be required. The confinement of a person in anywise is an imprisonment; so that keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. One or two instances as to imprisonment may serve to illustrate what is here said. Thus

it was held in one case by Lord Holt (*o*), that where A. has a chamber adjoining the chamber of B., and has a door that opens into it, by which there is a passage to go out, and A. has another door, which C. stops, so that A. cannot go out by that, this is no imprisonment of A. by B., because A. may go out by the door in the chamber of B., though he be a trespasser by doing it. But A. may have a special action upon his case against C. In a late case (*p*), a plaintiff attempting to pass in a particular direction was obstructed by the defendant, who prevented him from going in any direction but one, not being that in which he had endeavoured to pass. This was held by the majority of the judges of the Queen's Bench to be no imprisonment; and this whether the plaintiff had or had not a right to pass in the first-mentioned direction. The law favours liberty, and gives an action of trespass for false imprisonment, to recover damages (*q*).

The King cannot send any subject of England against his will to serve him out of England, not even unto Ireland as Lord-Lieutenant there, for that would be banishment, which none but the Legislature can inflict, except in the singular instance of pressing sailors, upon urgent necessity, in the time of war. But the King, by his royal prerogative, may issue out his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign parts without license, for this also may be necessary for the public service and safeguard of the commonwealth (*r*). The law, indeed, so much discourages unlawful confinement, that if a man is under duress of imprisonment until he seals a bond, or the like, he may allege this duress, and avoid the extorted bond (*s*). To make imprisonment lawful it must be either by process from the courts of judicature, or by warrant from some legal officer, having authority to

commit to prison ; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of commitment, in order to be examined into, if necessary, upon a habeas corpus ; for if there be no cause expressed, the gaoler is not bound to detain the prisoner. We are not now speaking of the mere arrest of a person, which, as we shall see hereafter, may, in some criminal cases, be without a warrant (*t*).

*Reputation.*]—The reputation of a person also is under the protection of the law ; for persons in their natural capacities, absolutely and simply considered, have an interest in their good name. Injuries affecting a man's reputation or good name are :—1st, by malicious, scandalous, and slanderous words, tending to his damage and derogation ; 2nd, by printing and writing libels against him ; and 3dly, by preferring malicious indictments or prosecutions against him ; the remedies for which will be severally considered in the subsequent parts of this work.



## CHAP. V.

## THE SOVEREIGN.

[See 1 BL. Com. ch. 3; 2 Steph. Com. B. 4, ch. 2—6, p. 416—543.]

Having in the last chapter treated of persons in their natural capacities, or rather as individuals, we now have to notice persons in their relative or civil capacity. This branch of our subject will extend to some length and embrace some of the most important titles of the law.

It is to be observed that a person in his relative or civil capacity is either the sovereign or a subject. Subjects are either of the clergy or laity; of the nobility or commonalty; and some among the nobility or commonalty are of the military or maritime state. Persons also, in their civil capacities, may be considered as public officers, and incorporated bodies; and lastly, in the relative characters of master and servant, husband and wife, parent and child, guardian and ward.

¶ The Sovereign, that is the King, or Queen regnant, is the head of the commonwealth, and the only supreme governor; and it matters not to which sex the Crown descends; but the person entitled to it, whether male or female, is immediately invested with all the

ensigns, rights, and prerogatives of sovereign power. The King may be considered with regard to his title, his family, his councils, his duties, his prerogative, and his revenue.

*Sovereign's title.*]—The King's title is hereditary or descendible to the next heir, on the death or demise of the last proprietor; and as to the particular mode of inheritance, it in general corresponds with the feudal path of descent, chalked out by the common law, in the succession to landed estates; yet with one or two material exceptions. Like them, the Crown will descend lineally to the issue of the reigning monarch; as in them, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. Like them, on failure of the male line, it descends to the issue female: but it descends to the eldest daughter only and her issue; and not, as in common inheritances, to all the daughters at once. The doctrine, also, of representation prevails in the descent of the Crown, as it doth in other inheritances; whereby the lineal descendants of any person deceased stand in the same place as their ancestors, if living, would have done. And lastly, on failure of lineal descendants, the Crown goes to the next collateral relation of the late King, provided they are lineally descended from the blood royal; that is, from that royal stock which originally acquired the Crown. But herein there is no objection (as formerly and even now partially in the case of common descents) to the succession of a brother, an uncle, or other collateral relation of the half blood. The doctrine of hereditary right, however, does by no means imply an indefeasible right to the throne; for it is unquestionably in the power of the supreme legislative authority of this kingdom, the King and both

Houses of Parliament, to defeat this hereditary right, and by particular intails, limitations, and provisions, to exclude the immediate heir, and to vest the inheritance in any one else; but, however the Crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it. Hence, in our law, the King is said never to die in his political capacity; though, in common with other men, he is subject to mortality in his natural; because, immediately upon his natural death, the King survives in his successor: for the right of the Crown vests *eo instanti* upon his heir, either the *hæres natus*, if the course of descent remains unimpeached; or the *hæres factus*, if the inheritance be under any particular settlement: so that there can be no *interregnum*; but the sovereignty is fully invested in the successor by the descent of the Crown (*a*).

*The sovereign's family.*—The first and most considerable branch of the royal family is the Queen. The Queen of England is either Queen Regnant, Queen Consort, or Queen Dowager.

A Queen Regnant is she who holds the Crown in her own right as sovereign; and such a one has the same power, prerogatives, rights, dignities, and duties, as if she had been a King. This is the case of our present sovereign, Queen Victoria.

A Queen Consort is the wife of the reigning King; and she, by virtue of her marriage, is participant of divers prerogatives above other women. She is a public person, exempt and distinct from the King, and may purchase lands, convey them, make leases, grant copyholds, and do other acts of ownership, without the concurrence of her lord; which no other married woman can do. She is capable of taking a grant from the King. She hath separate

courts and officers distinct from the King's, not only in matters of ceremony, but of law. She may sue and be sued alone, without joining her husband. She may have a separate property in goods as well as land; and has a right to dispose of them by will. The Queen pays no toll, nor is liable to any amercement in any court. She is entitled to an ancient perquisite called queen-gold, *Aurum Reginae*; and to some others of the like kind; but in general, unless where the law has expressly declared her exempted, she is upon the same footing with other subjects. However, to compass or imagine her death, or to violate her person, is treason.

A Queen Dowager is the widow of the King, and as such enjoys most of the privileges of his Queen Consort.

The second branch of the royal family is the Prince of Wales, or heir apparent to the crown. He is usually made Prince of Wales and Earl of Chester by special creation; but, being the King's eldest son, he is by inheritance Duke of Cornwall without any new creation.

By the act of settlement (12 & 13 Will. 3, c. 2), the Princess Sophia, Electress and Duchess Dowager of Hanover, the daughter of Elizabeth Queen of Bohemia, daughter of James I., is declared to be next in succession, in the Protestant line, to the imperial crown of these kingdoms, after the death of his Majesty King William and the Princess Anne of Denmark, and in default of their issue respectively; so that the common stock, or ancestor, from whence the present royal family must be derived, is the Princess Sophia.

By the 31 Hen. 8, c. 10, no person except the King's children shall sit at the side of the cloth of state in the Parliament chamber; and the King's son, brother, uncle, nephew, or brother's or sister's

son, shall have precedency over the officers of state and nobles therein named. Under the word children the King's grand-children are included. The education and care of all the King's grand-children, while minors, together with the approbation of their marriages when grown up, belong of right to the King, even during their father's life; and this care and approbation extend also to the presumptive heir of the Crown. By 6 Hen. 6, c. 4, the marriage of a queen dowager without the consent of the King is prohibited. And by 12 Geo. 3, c. 11, no descendant of King George II., other than the issue of princesses married into foreign families, is capable of contracting matrimony without the previous consent of the King, signified under the great seal; and any marriage contracted without such consent is void, provided that such of the descendants as are above the age of twenty-five may, after a twelvemonth's notice given to the King's privy council, contract and solemnise marriage without the consent of the Crown, unless both Houses of Parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage; and all persons solemnising, assisting, or being present at such prohibited marriage, shall incur the penalties of *præmunire*. It has been held that the above act extends to prohibit the contracting of marriage, or to annul any already contracted in violation of its provisions, wherever the same may be contracted or solemnised, either within the realm of England or without (*b*).

*Royal councils.*—The King's councils consist of the court of Parliament, the peers of the realm, the judges of the courts of law, and the privy council.

The Parliament, as to its constituent parts, we

have already described; and shall therefore only mention, that it is among the prerogatives of majesty to consult with this august assembly; for it is called in writs and judicial proceedings *Commune Concilium Regni Angliæ*.

The peers of the realm are by their birth hereditary counsellors of the Crown, and may be called together by the King to impart their advice in all matters of importance to the realm, either in time of Parliament, or, which has been their principal use, when there is no Parliament in being.

The judges are the King's counsellors in matters of law; and by the so-called statute 13 Edw. 3, c. 4, they are expressly required to counsel the King in his business. There are various instances of the exercise of this prerogative, as in Sir John Fenwick's case; and in the reign of George I., when it was made a question, whether the education and marriage of the Prince of Wales's children belonged to the King or their father, and more recently in the case of Admiral Byng, in the reign of George II. (c).

*Privy council.*]—The privy council is the principal council belonging to the King, and it is generally called by way of eminence the council. The number of privy councillors is at the King's will, but anciently there were twelve or thereabouts. Afterwards it increased to so large a number, that it was found inconvenient for secrecy and dispatch; and therefore King Charles II. limited it to thirty; but since that time the number has been much augmented, and now continues indefinite—ordinarily such only as are *cabinet ministers* are summoned to advise the sovereign, so that no inconvenience arises from the large number of privy councillors. They are made by

the King's nomination, without either patent or grant; and, on taking the necessary oaths, they become immediately privy councillors during the life of the King that chooses them, but subject to removal at his discretion. Any natural-born subject may be a privy counsellor; but by 12 & 13 Will. 3, c. 2, no person born out of the dominions of the Crown of England, unless born of English parents, even though naturalised by Parliament, shall be capable of being of the privy council. The duty of a privy councillor is to advise the King according to his best cunning and discretion, for the honour of the King and good of the public, without partiality through affection, love, meed, doubt, or dread; to keep the King's councils secret; to avoid corruption; to help and strengthen the execution of what shall be resolved; to withstand all persons who would attempt the contrary; and to observe, keep, and do all that a good and true councillor ought to do to his sovereign lord. The power of the privy council extends to inquire into all offences against the Government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law; but their jurisdiction herein is only to inquire, and not to punish; and persons committed by them are entitled to their *habeas corpus*.

In certain cases, also, the privy council has judicial power — viz., in colonial causes, which arise out of the jurisdiction of this kingdom; in appeals from the Lord Chancellor in matters of lunacy or idiotcy; in appeals from the ecclesiastical courts and maritime courts; and in applications to prolong the term of patents for new inventions, and to license the republication of books under the Copyright Act (*d*). And to the same supreme tribunal there is, besides, in causes of a certain

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amount, an appeal in the last resort from the sentence of every court of justice throughout the colonies and dependencies of the realm (e). Practically, however, all the judicial authority of the privy council is now exercised by a committee of privy councillors, called the Judicial Committee of the Privy Council, who hear the allegations and proofs, and make their report to her Majesty in council, by whom the judgment is finally given.

The judicial committee consists of the Lord President, the Lord Chancellor, and such of the members of the council as shall from time to time hold certain judicial offices enumerated in the act; and all persons members of the council who shall have been president thereof, or Chancellor of Great Britain, or shall have held any of the above offices. And any two other persons, being members of the council, may be appointed to be members of the committee. No matter can be heard unless in the presence of four members of the committee; and a majority of those present at the hearing must concur in the judgment.

Formerly the privy council was dissolved, *ipso facto*, by the sovereign's demise, but by 6 Anne, c. 7, the privy council shall continue for six months after the demise of the Crown, unless sooner determined by the successor; but the King, during his life, may dissolve it, or discharge any particular member whenever he thinks proper.

*The King's duties.*—The principal duty of the King is to govern his people according to law; for by 12 & 13 Will. 3, c. 2, the laws of England are the birth-right of the people; and all the Kings and Queens that shall ascend the throne of this realm, ought to administer the government of the same according to the said laws. By the coronation



oath also, which by 1 Will. & Mary, c. 6, is to be administered to every King and Queen, by one of the archbishops or bishops of the realm, in the presence of all the people, the sovereign solemnly promises to govern according to the statutes in Parliament agreed on, and the laws and customs of the realm; to cause law and justice in mercy to be executed in all its judgments; to maintain the laws of God, the profession of the gospel, and the Protestant reformed religion. And this oath is considered a fundamental, original, and express contract between the King and his people (f).

*The King's prerogative.*—By the word prerogative we usually understand that special pre-eminence which the King hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. Prerogatives are either direct or incidental. The direct are such positive substantial parts of the royal character and authority, as are rooted in and spring from the King's political person, considered merely in itself without reference to any other extrinsic circumstance; as the right of sending ambassadors, of creating peers, of making war or peace. The incidental are such as always bear a relation to something else distinct from the King's person; and are indeed only exceptions in favour of the Crown to those general rules that are established for the rest of the community; such as, that no costs shall be recovered against the King; that the King can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects. The substantive or direct prerogatives are such as respect the King's royal character, his royal authority, and his royal income. The law ascribes to the King the attribute of sovereignty; and he is said to have imperial dignity, as the head

of the realm, in matters both civil and ecclesiastical, owing no kind of subjection to any other potentate upon earth. No suit or action, therefore, can be brought against the King, even in civil matters; because no court can have jurisdiction over him. But the law hath not left the subject without remedy; for as to private injuries, in respect of property or contract, if any person has a just demand upon the King, he may petition him in his court of Chancery, where his Chancellor will administer right as a matter of grace, though not upon compulsion (*g*). As to public oppression, as the King cannot misuse his power without the advice of evil councillors, and the assistance of wicked ministers, the constitution has provided, by means of indictments and parliamentary impeachments, that no man shall dare to assist the Crown in contradiction to the law of the land. Therefore, although it is a maxim that "the King can do no wrong," yet his ministers and councillors may be punished. The King, also, is not only incapable of doing wrong, but of thinking wrong; for, in his political character, the law will not suppose that any folly or weakness can exist, or that he can ever mean to do an improper thing; and, therefore, if the Crown should be induced to grant any franchise or privilege to a subject, contrary to reason, or in anywise prejudicial to the commonwealth or to a private person, the law declares that the King was deceived in his grant, and will render such grant void (*h*). The law also formerly was, that as the King cannot be guilty of negligence or *laches*, so no delay should bar his right. The maxim was, "*Nullum tempus occurrit Regi*," which was grounded on this, namely, that the law intends that the King is always busied for the public good, and therefore has not leisure to

assert his right within the times limited to subjects. From this doctrine it followed, not only that the civil claims of the Crown received no prejudice by the lapse of time, but that criminal prosecutions for felonies or misdemeanors (which are always brought in the Sovereign's name) might be commenced at any distance of time from the commission of the offence. And all this is in general still law; but by statute it has been in modern times largely qualified, for by 9 Geo. 3, c. 16, the Crown is now barred from its civil right in suits relating to landed property by the lapse of sixty years, and by 32 Geo. 3, c. 58, is barred in informations for usurping corporate offices or franchises, by the lapse of six years, and by 7 Will. 3, c. 3, an indictment for treason (except for an attempt to assassinate the King) must be found within three years after the commission of the act of treason. It is, however, to be remarked that the Crown is not bound by the important modern act for the limitation of suits and actions, which is the 3 & 4 Will. 4, c. 27 (i). In the King, also, can be no stain or corruption of blood; for if the next heir to the Crown were attainted of treason and felony, and afterwards the Crown should descend to him, this would purge the attainder *ipso facto*. The King cannot, in judgment of law, ever be a minor, or under age; and therefore his royal grants and assents to acts of Parliament are good, though he has not, in his natural capacity, attained the legal age of twenty-one. The King never dies; for the law ascribes to him, in his political capacity, an absolute immortality; and therefore, although Henry, Edward, or George may die, yet the King survives them all; for immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without

any *interregnum* or interval, is vested at once in his heir, who is *eo instanti* King to all intents and purposes. The King is the sole magistrate of the nation, all others acting by commission from and in due subordination to him. The King may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon (except in two or three instances) what offences he pleases. With regard to foreign concerns, the King is the delegate or representative of his people; and what is done by the royal authority with regard to foreign powers is the act of the whole nation. Considered, therefore, as the representative of his people, the King has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home. It is also the King's prerogative to make treaties, leagues, and alliances with foreign states and princes, of declaring war and peace, of issuing letters of marque and reprisal, of granting safe-conducts, without which, by the law of nations, no member of one society has a right to intrude into another. The King is considered as the generalissimo, or the first in military command within the kingdom, and in this capacity has the sole power of raising and regulating fleets and armies; of erecting, and manning, and governing all forts and other places of strength within the realm, so that no subject can build a castle, or house of strength embattled, or other fortress defensible, without his license. He has also the prerogative of appointing ports and havens, or such places only for persons and merchandise to pass into and out of the realm as he sees proper; but he cannot narrow or confine their limits when once established (*j*). The direction of beacons, light-houses, and sea-marks, is also a branch of the royal prerogative; and the King hath the exclusive power, by commission

under his great seal, to cause them to be erected in fit and convenient places, as well upon the land of the subject as upon the demesnes of the Crown, which power is usually vested by letters patent in the Lord High Admiral. By 8 Eliz. c. 13, and 6 & 7 Will. 4, c. 79, the corporation of the Trinity House are empowered to set up any beacons or sea-marks wherever they shall think them necessary, and the several light-houses on the coasts are placed under their supervision. By 12 Car. 2, c. 4, and 29 Geo. 3, c. 16, the King may prohibit the exportation of arms or ammunition out of the kingdom, under severe penalties (*k*). He may also, whenever he sees proper, confine his subjects to stay within the realm, or recal them when beyond the seas. The King is the fountain of justice, and general conservator of the peace of the kingdom, and has alone the right of erecting courts of judicature; but he cannot administer justice personally, for he has delegated that power exclusively to his judges (*l*). Criminal proceedings or prosecutions for offences are either against the King's peace or his crown and dignity, and he is, therefore, always nominally the prosecutor. The King is likewise the fountain of honour, of office, and of privilege, and this in a different sense from that in which he is styled the fountain of justice; for here he is really the parent of them, and therefore all degrees of nobility, of knighthood, and other titles, are received by immediate grant from the Crown, either expressed in writing by writs or letters patent, as in the creation of peers and baronets; or by corporal investiture, as in the creation of a simple knight. From the same principle also arises the prerogative of erecting and disposing of offices, for honours and offices are in their nature convertible and synonymous. Upon a like reason, the King has

also the prerogative of conferring privileges on private persons, such as granting place or precedence to any of his subjects; so he has the prerogative of erecting corporations, whereby a number of private persons are united and knit together, and enjoy many liberties, powers, and immunities, in their politic capacity, which they were utterly incapable of in their natural (*m*). Another light in which the laws of England consider the King, is as the arbiter of domestic commerce, and he is therefore invested with the prerogative of establishing public marts or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging, for these can only be set up by virtue of the King's grant, or by long and immemorial usage and prescription, which prescriptions presuppose grants (*n*), of regulating weights and measures, and of giving authenticity to his coin, or making it current as a universal medium of traffic. Lastly, the King is considered as the head and supreme Governor of the national Church; and in virtue of this authority he convenes, prorogues, restrains, regulates, and dissolves, all ecclesiastical synods or convocations. From this prerogative also arises the King's right of nomination to vacant bishoprics, and certain other ecclesiastical preferments. As the head of the Church, likewise, the King is the *dernier ressort* in all ecclesiastical causes, an appeal lying ultimately to him in council from the sentence of every ecclesiastical judge (*o*).

## CHAP. VI.

## OF THE ROYAL REVENUE.

The royal revenue is now under the control of the Lords Commissioners of the Treasury, but it is more immediately under the management of the Court of Exchequer, which has a department termed the revenue side.

The King's revenue is either ordinary or extraordinary. The ordinary revenue arises from,—1, the custody of bishoprics; 2, corodies; 3, tithes; 4, first-fruits; 5, Crown lands; 6, forest lands; 7, courts of justice; 8, royal fish; 9, shipwrecks; 10, mines; 11, treasure trove; 12, waifs; 13, estrays; 14 forfeitures; 15, escheats; 16, idiots and lunatics.

*Custody of bishoprics*].—The custody of the temporalities of bishops, by which are meant all the lay revenues, lands, and tenements (in which is included his barony), which belong to an archbishop's or bishop's see; and these, upon the vacancy of a bishopric, are immediately the right of the King, as a consequence of his prerogative in Church matters, with power of taking to himself all the intermediate profits, without any account to the successor, and

with the right of presenting (which the Crown very frequently exercises) to such benefices or other preferments as fall within the time of vacation. But this revenue, which was formerly very considerable, is now, by a customary indulgence, almost reduced to nothing; for at present, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalities, entire and untouched, from the King (*a*).

*Corodies.*—Corodies is a privilege arising out of every bishopric, which authorises the King to send one of his chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promotes him to a benefice; but this is now fallen into total disuse: it is, however, still due of common right, and no prescription will discharge it.

*Tithes.*]—The King also is entitled to all tithes arising in extra-parochial places (*b*).

*First fruits.*]—First fruits and tenths of all spiritual preferments in the kingdom; but by the 2 & 3 Anne, c. 11, all the revenue of first-fruits and tenths is vested in trustees for ever, to form a perpetual fund for the augmentation of poor livings. This is denominated Queen Anne's bounty, and is regulated by several other statutes (*c*).

*Demesne lands.*]—The next branch of the King's ordinary revenue consists in the rents and profits of the demesne lands of the Crown, which were either the share reserved to the Crown at the original distribution of landed property, or such as came to it afterwards by forfeitures or other means, and which were anciently very large and extensive,



comprising divers manors, honours, and lordships; at present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. Several statutes have been passed, the effect of which is that all grants and leases from the Crown for any longer term than thirty-one years, are, in general, subject to certain exceptions, declared to be void (*d*). The superintendence of this branch of the royal property is now vested in commissioners, called the Commissioners of Woods, Forests, Land Revenues, Works and Buildings.

*Forests.*]—The King is also entitled to the profits arising from his forests; which are waste grounds belonging to the King, replenished with all manner of beasts of chase or venery; and these profits consist principally in amerciaments or fines, levied for offences against the forest laws. But few if any courts of this kind, for levying amerciaments, have been held since the reign of Charles I.

*Courts of justice.*]—The profits arising from the King's ordinary courts of justice are also a branch of his ordinary revenue, and consist not only in fines imposed upon offenders, forfeitures, recognisances, and amerciaments levied upon defaulters, but also in certain fees due to the Crown in a variety of legal matters; but these have been almost all granted out to private persons, or else appropriated to particular uses. All future grants of them, however, by 1 Anne, st. 2, c. 7, are to endure for no longer time than the prince's life who grants them (*e*).

*Royal fish.*]—Royal fish, which are whale and sturgeon, when either thrown ashore or caught near

the coast, are the property of the King, by the statute 17 Edw. 2, c. 11, *De Prærogativâ Regis* (f).

*Shipwrecks.*]—Shipwrecks also are declared to be the King's property; but this revenue of wrecks is frequently granted out to lords of manors as a royal franchise. In order to constitute a legal wreck the goods must come to land. If they continue at sea, the law distinguishes them by the barbarous and uncouth appellations of jetsam, flotsam, and ligam. Jetsam is where goods are cast into the sea, and there sink and remain under water; flotsam is where they continue swimming on the surface of the waves; ligam is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again. These are also the Crown's if no owner appears to claim them; but, if any owner appears, he is entitled to recover the possession. For, even if they be cast overboard without any mark or buoy, in order to lighten the ship, the owner is not by this act of necessity construed to have renounced his property, much less can things ligam be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. These then are accounted so far a distinct thing from the former, that, by the royal grant to a man of wrecks, things jetsam, flotsam, and ligam will not pass (g).

*Mines.*]—Mines of gold and silver also are a branch of the royal revenue, originating from the King's prerogative of coinage, in order to supply him with materials. But by the statutes 1 Will. and Mary, c. 30, and 5 Will. and Mary, c. 6, no mines of copper, tin, iron, or lead, shall be looked upon as royal mines, notwithstanding gold or silver may be extracted from them in any quantities: but

the King, or persons claiming royal mines under his authority, may have the ore (other than tin ore in the counties of Devon and Cornwall) (*h*), paying for the same a stated price.

*Treasure trove.*] — Treasure trove, also, which is any money, coin, gold, silver, plate, or bullion, found hidden in the earth, or other private place, the owner thereof being unknown, belong to the King; but if he that hid it be known or afterwards found out, the owner, and not the King, is entitled to it. If it be found in the sea or upon the earth it doth not belong to the King but to the finder, if no owner appears (*i*).

*Waifs.*] — Waifs, also, which are *bona waviata*, or goods stolen and waived, or thrown away by the thief in his flight, are given to the King, as a punishment upon the owner for not himself pursuing the felon, and taking away his goods from him (*j*).

*Estrays.*] — Estrays, or such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them, are given to the King, as the general owner and lord paramount of the soil, in recompense for the damage they may have done therein; and they now most commonly belong to the lord of the manor, by special grant from the Crown. Any beast may be an estray that is by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses; but dogs, cats, and animals *feræ naturæ*, as bears or wolves, cannot be considered as estrays. Swans also may be estrays, but not any other fowl; whence they are said to be royal fowl (*k*).

*Forfeitures.*] — The forfeiture of lands and goods

for offences, and formerly deodands, or whatever personal chattel is the immediate cause of the death of any reasonable creature, are also the property of the King. But by the 9 & 10 Vict. c. 62, deodands are abolished, and there is to be no forfeiture of any chattel in respect to its having moved to or caused any death.

*Escheats.*]—Escheats of lands which happen upon the defect of heirs to succeed to the inheritance form also parts of the King's ordinary revenue (*l*).

*Idiots and lunatics.*]—The custody of idiots and lunatics was formerly a profitable source of revenue. The custody of an idiot and his lands is given to the King, both by the common law, as the general conservator of his people, and by the statute 17 Edw. 2, c. 9, in order to prevent the idiot from wasting his estate, and reducing himself and heirs to poverty and distress. The statute directs that the King shall have ward of the lands of natural fools, taking the profits without waste or destruction, and shall find them necessaries; and after the death of such idiots, he shall render the estate to the heirs. The King is also the guardian of lunatics, as well as idiots, but to a very different purpose. For the law always imagines that the misfortune of lunacy may be removed, and, therefore, only constitutes the Crown a trustee to protect their property, and account to them for all profits received, if they recover, or after their decease to their representatives (*m*).

But these revenues, which constituted the proper patrimony of the Crown, being got into the hands of private subjects, it became necessary that private contributions should supply the public service; and these latter contributions or Parliamentary grants, which have in former times been called by the names

of aids, subsidies, and supplies, and now are known under the denomination of *taxes*, form the extraordinary revenues of the Crown, and consist in:—1, The land tax; 2, The customs; 3, The excise duties; 4, The postage of letters; 5, The stamp duties; 6, The duty on offices and pensions; 7, The assessed taxes; 8, The income tax.

*Land tax.*]—The land tax, in its modern shape, has superseded the ancient mode of rating property by tenths, fifteenths, subsidies, hydages, scutages, or talliages. By the 38 Geo. 3, c. 60, the land tax was converted into a perpetual tax, and fixed at four shillings in the pound, but made subject, on the other hand, to redemption by the landholder. The tenant of the land is also, by 38 Geo. 3, c. 5, s. 17, liable to a distress in the event of this tax remaining in arrear; but is, by the same act, entitled to deduct the amount which he has paid for it (unless he has expressly agreed to pay all the taxes) out of the first sum that shall become due for rent; the tax being, as between landlord and tenant (generally considered), a charge upon the former. The land tax, however, is, properly speaking, a tax neither on landlord or tenant, but on the beneficial proprietor, as distinguished from the mere tenant at rack rent; and if the tenant has to any extent a beneficial interest, he becomes liable to the tax *pro tanto*, and can only charge the residue on his landlord (*n*).

*Customs.*]—The customs are perpetual taxes payable upon merchandise exported and imported: in the year 1787 was passed the 27th Geo. 3, c. 13, called the Customs Consolidation Act, by which the amount of duties and the articles on which they should be levied were defined. The law of customs, thus simplified and consolidated, has since received

various other improvements by successive acts of Parliament passed from time to time for the purpose, and the whole was in the last reign reduced into several statutes repealing all former provisions, and forming a new code upon the subject. But to this many additions have now been recently made, particularly by the 5 & 6 Vict. c. 47, the 8 Vict. c. 7, and 9 & 10 Vict. cc. 22, 23, 63, which have abolished the greater part of the duties, and introduced a near approximation to free trade in foreign productions (*o*).

*Excise.*]—The excise duty is an inland imposition, paid sometimes upon the consumption of the commodity, and frequently upon the retail sale. Among the articles subject to excise are malt, spirits, soap, glass, paper, bricks, hops, sugar, and vinegar. It comprises besides the duty on lands and goods sold by auction (*p*).

*Post-office.*]—The Post-office revenue arises from the carriage of all letters, which by several statutes is confined exclusively to the Crown. By the 3 & 4 Vict. c. 96, the rate of postage was reduced to a very low amount, and was made uniform so far as relates to inland letters. By that act the privilege exercised by members of Parliament, of franking, or sending and receiving letters free of duty, was abolished (*q*).

*Stamp Duties.*]—The stamp duties arise from taxes imposed upon all parchment and paper whereon any legal proceedings, or private instruments of almost any nature, are written; and also upon licences, hackney carriages, stage carriages, or to trade as bankers or pedlars; upon all newspapers, advertisements, cards, dice. These imposts

vary in amount according to the nature of the instrument stamped (*r.*)

*Offices and Pensions.*—Another branch of the King's extraordinary revenue is the duty imposed by 31 Geo. 2, c. 22, on offices and pensions; consisting in the payment (over and above all other duties), out of all salaries, fees, and perquisites of offices and pensions payable by the Crown.

*Assessed taxes.*—Another branch of the revenue consists of the assessed taxes, or duties assessed and charged upon persons in respect of articles in their use or keeping. The duties now comprised under this branch of taxation, are those on windows, servants, carriages, horses, dogs, hair powder, armorial bearings, and game certificates (*s.*)

*Property and income tax.*—Another branch of revenue is the tax on property and income, which though purporting to be a temporary expedient, is likely to become a permanent burthen. The statute originating it (5 and 6 Vict. c. 35) was limited to a period of three years. It imposed a charge of seven pence in the pound on (1) all lands, tenements, and hereditaments; (2) on all annuities, dividends, and shares of annuities payable to any person, corporation, or company; (3) the annual profits or gains arising from any kind of property whatever, and wherever situate, and upon the annual profits and gains arising or accruing to any person from any profession, trade, employment, or vocation; (4) upon any public office or employment of profit, and upon every annuity, pension, or stipend payable by her Majesty out of the public revenue, except annuities before charged. By the 8 & 9 Vict. c. 4, the rates and duties granted by the 5 &

6 Vict. c. 35, were continued until the 5th April, 1848, and they have been further continued by an act of the 12 of Victoria (*t*).

The taxes above enumerated (which, with other trifling ones, form the Consolidated Fund) are levied to discharge the expenses which are annually incurred by the Government, in respect of the public service; and a very large proportion of these expenses consists in payments made on account of the interest of the national debt. This debt is in part funded and in part unfunded. The unfunded debt is very small, and is generally secured by Exchequer Bills. The funded debt is nearly £800,000,000, and is an annual charge of about £29,000,000.

The form of the security held by public creditors, in respect of the funded debt, is that of annuities, mostly perpetual, upon which interest at a certain rate is paid. These annuities are denominated the public funds. They are transferable by the holder, and are otherwise considered as personal property.

The Consolidated Fund is also charged with the payment of the civil list and the salaries of the judges and ambassadors, and other high official persons. The civil list is an annual sum granted by Parliament at the commencement of each reign for the expense of the royal household and establishment, and is made in consideration of the assignment of its proper patrimony to the public use, by which the nation is said to be a great gainer. The present civil list is fixed at £385,000 per annum, out of which the sum of £60,000 is assigned for her Majesty's privy purse (*u*).



## CHAP. VII.

## ALIENS AND DENIZENS.

[1 Black. Com. ch. 10; 2 Steph. Com. B. 4, ch. 2.]

Having finished our account of the person and attributes of the Sovereign in his relative capacity, we proceed next to inquire into the relation of his subjects or people, whether aliens, denizens, or natives.

*Subjects.*]—The most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the Crown of England, that is, within the allegiance of the King: and aliens are such as are born out of it. Allegiance is the tie or *ligamen* which binds the subject to the King, in return for that protection which the King affords the subject. The ancient oath of allegiance contained a promise “to be true and faithful to the King and his heirs, and truth and faith to bear of life and limb, and terrene honour, and not to know or hear of any ill or damage intended him, without defending him therefrom.” But at the Revolution the terms of this oath were altered; the subject only promising “that he will be faithful, and bear true allegiance to the King;” without mentioning “his heirs,” or specifying in the least wherein that alle-

giance consists. The oath of supremacy is principally calculated as a renunciation of the Pope's pretended authority; and the oath of abjuration very amply supplies the loose and general texture of the oath of allegiance. These oaths (or in the case of Roman Catholics, an oath in substitution for them), must be taken by all persons in any office, trust, or employment (*a*); and may be tendered by two justices of the peace to any person whom they shall suspect of disaffection. And the oath of allegiance may be tendered to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the court leet, or in the sheriff's tourn. But besides these express engagements, the law also holds, that there is an implied, original, and virtual allegiance owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. Allegiance, both express and implied, is distinguished into two species, the one natural,—the other local. Natural allegiance is such as is due from all men born within the King's dominions, immediately upon their birth; for immediately upon their birth they are under the King's protection; and this allegiance cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance; nor by anything but the united concurrence of the legislature. An Englishman who removes to France or to China, owes the same allegiance to the King of England there, as at home, and twenty years hence as well as now; for it is by some writers said to be a principle of universal law, though the practice of some foreign countries is different, that the natural-born subject of one Prince cannot, by any act of his own, put off or discharge his natural allegiance; though he may forfeit his

rights as a British subject by adhering to a foreign power (b). Local allegiance is such as is due from an alien or a stranger for so long time as he continues within the King's dominion and protection; for it ceases the instant such stranger transfers himself from this kingdom to another.

*Foreigners coming into England.*—By the law of nations, no member of one society has a right to intrude into another; the admission of strangers, therefore, entirely depends on the will of the State. But great tenderness is shown by our laws, not only to foreigners driven on the coast by necessity, or by any cause that deserves pity or compassion, but with regard also to the admission of strangers who come spontaneously; for, so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the King's protection, though liable to be sent home whenever the King sees occasion. By the 6 & 7 Will. 4, c. 11, aliens are required to be registered, but the act is little attended to. By an act of the 12th Vict. powers have been given to the Secretary of State to order (with certain exceptions) any alien to quit the kingdom. An appeal lies against any such order (c). But no subject of a nation at war with us can, by the law of nations, come into the realm; nor can travel upon the high seas, or send his goods and merchandise from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct; which, by divers ancient statutes, must be granted under the King's seal, and inrolled in Chancery. But passports under the King's sign manual, or licences from his ambassadors abroad, are now more usually obtained, and are allowed to be of equal validity.

*Aliens.*—Aliens, as contradistinguished from natural-born subjects, are such as are not born within the dominions of the Crown of England, or within the allegiance of the King. But from this rule of the common law must be excepted, the children of the Kings of England, in whatsoever parts they be born; the children of the King's ambassadors born abroad; for as the father, though in a foreign country, owes not even a local allegiance to the Prince to whom he is sent, so his children are held to be born (by a kind of *postliminium*) under the King of England's allegiance, represented by his father the ambassador. To encourage also foreign commerce, it is enacted by 25 Edw. 3, st. 2, "that all children born without the ligeance of the King, whose fathers *and* mothers at the time of their birth shall owe allegiance to the King, shall be the same as subjects born within the dominions of the Crown, if the mothers of such children do pass the sea by the licence and will of their husbands."—And it seems not to be material whether the parents of such children be married abroad or in England; or whether the mother be an alien or not; provided the father be a merchant, and resided out of the King's dominions for the purpose of merchandising. By 7 Anne, c. 5, the children of all natural-born subjects born out of the dominions of the Crown, shall be deemed natural-born subjects of this kingdom.—And this act is, by 4 Geo. 2, c. 21, explained to mean all such children whose fathers are natural-born subjects at the time of the birth of such children, except their fathers were attainted or banished beyond sea for high treason, or were then in the service of a Prince at enmity with Great Britain. By 12 and 13 Will. 3, c. 2, s. 3, and 25 Geo. 2, st. 2, c. 39, natural-born subjects may inherit and make their title by

ancestors born beyond sea (*d*). By 13 Geo. 3, c. 21, all persons born out of the allegiance of the Crown of Great Britain, whose fathers, by 7 Anne, c. 5, and 4 Geo. 2, c. 21, are entitled to the rights of natural-born subjects, shall be considered as natural-born subjects. But this did not extend to the case of a mother marrying a foreigner, and having a child abroad, and it was accordingly held that such a child could not inherit his mother's lands in England (*e*). But now by the 7 and 8 Vict., c. 66, every person born or to be born in a foreign country of a mother being a natural-born subject, may take any estate, real or personal, by devise or purchase, or inheritance of succession.—And by sect. 16 of the same statute any alien woman married to a natural-born subject or person naturalised, shall be thereby naturalised and have all the rights and privileges of a natural-born subject, the chief among which will be the right to dower (*f*).

By the policy of the English constitution, aliens lie under several disabilities, and are denied in many instances the benefit of our laws: they cannot purchase lands except for the King's use; they are incapable of taking by descent or inheriting (though, as we have seen, title may in certain cases be traced through them); they cannot take benefices without the King's licence, and they cannot enjoy a place of trust, or take a grant of lands from the Crown. Aliens are, however, allowed to carry on trade; which privilege is confirmed to them by Magna Charta, and divers other acts of Parliament: and the spirit of modern jurisprudence rather contracts than extends the disabilities of aliens, because the shutting them out tends to the loss of the people, which, laboriously employed, are the true riches of the country; they are therefore allowed to maintain personal actions, for this privilege is

essentially necessary to their character as merchants. And it has been accordingly held that an alien friend, though resident abroad, is entitled to sue in the Courts at Westminster for a libel published concerning him in England (*g*).

An alien-merchant could always take a lease of a house for his habitation, for years only; though formerly leases (but not assignments) of any dwelling-house or shop made to an alien-artificer or handicraftsman, were void by 32 Hen. 8, c. 16, s. 13. An alien could not take a lease for years of land, meadow, &c. not being necessary for his trade and traffic. But now by 7 & 8 Vict. c. 66, s. 5 (which does not extend to the colonies), an alien, now or hereafter residing in the United Kingdom, and being the subject of a friendly state, may, by grant, lease, demise, assignment, bequest, representation, or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or of occupation by him or her, or his or her servants, or for the purpose of any business, trade or manufacture, &c., for any term of years not exceeding twenty-one years, as fully and effectually, to all intents and purposes, and with the same rights, remedies, exemptions, and privileges (except voting at elections of members of Parliament), as if he were a natural born subject of the United Kingdom (*h*).

*Denizens.*]—A denizen is an alien born, but who has obtained, *ex donatione Regis*, letters patent to make him an English subject. A denizen is a kind of middle state between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not, but cannot take by inheritance; for his parent, through whom he must claim, had no inheritable blood; and therefore

could convey none to the son. The issue of a denizen born before denization cannot inherit to him; but his issue born after may. A denizen cannot be of the privy council, or either House of Parliament, or have any office of trust, civil or military; or be capable of any grant from the Crown. It is apprehended that denization may still take place, though it is probable that parties will, in practice, proceed to naturalisation under the 7 & 8 Vict. c. 66, the provisions of which will presently be stated (i).

*Naturalisation.*—Formerly an alien could be naturalised only by an act of Parliament, but now by the 7 & 8 Vict. c. 66, a new and less expensive mode of obtaining naturalisation is prescribed. The alien must first present a memorial to the Secretary of State, containing a statement of his age, profession, trade, or other occupation; the length of time he has resided in this country, and the grounds on which he seeks to obtain any of the rights of a British subject; and praying for a certificate, which must be granted before further steps can be taken. The certificate granted by the Secretary of State recites such parts of the memorial as, after due investigation, are found to be true and material; and it confers upon the applicants all the rights and privileges of a British subject, except the capacity of being a member of the privy council, or a member of either House of Parliament, and except the rights and capacities (if any) specially exempted in and by such certificate. The certificate must be enrolled in the Court of Chancery, and within sixty days from its date the memorialist must take and subscribe an oath of allegiance. The course of proceeding to be adopted by aliens wishing to become naturalised is to be

regulated, so far as details are concerned, by the Secretary of State, and the amount of fees is to be fixed by the Lords of the Treasury. Persons naturalised before the passing of 7 & 8 Vict. c. 66, and who have resided in this country for five successive years, are entitled to all the rights conferred by that act (*j*).



## CHAP. VIII.

## CLERGY.

[See 1 Black. Com. ch. 11 ; 3 Steph. Com. Bk. IV., pt. 2, ch. 1.]

We now proceed to notice the clergy as distinguished from the laity.

*Rights and disabilities of clergy.*—The clergy comprehend all persons in holy orders and in ecclesiastical offices. A clergyman cannot be compelled to serve on a jury, nor to appear at a court leet, or view of frank-pledge ; but if a layman is summoned on a jury, and before trial takes orders, he shall notwithstanding appear and be sworn. A clergyman cannot be chosen to any temporal office, as bailiff, reeve, constable, or the like ; and, during his own continual attendance on the sacred function, he is (for a reasonable time, in going, staying, and returning) privileged from arrests in civil suits (*a*). But clergymen are incapable of sitting in the House of Commons, and they are also prohibited from farming or trading ; for by 1 & 2 Vict. c. 106, s. 28—30 (repealing some former acts on this subject), no spiritual person holding any cathedral prebend or benefice, or any curacy or lectureship, or allowed to perform the duties of any ecclesiastical office, shall take to farm for occupation, by himself,

any lands exceeding eighty acres in the whole, without permission in writing from the bishop of the diocese; nor shall such spiritual person, by himself or any other to his use, carry on any trade or dealing for profit, unless it be carried on by more than six partners, or his share in it shall have devolved to him by inheritance, or other such representative title, as in the act specified; and even in these excepted cases it is illegal for him to act as director or managing partner, or to carry on the trade in person. But, notwithstanding these prohibitions, the act allows him to carry on the business of a schoolmaster, or to deal with booksellers as to the sale of books, or to be a managing director, partner, or shareholder in any benefit society, or to buy or sell to the extent necessarily incident to his lawful occupation of land, or to sell minerals, the produce of his land, provided that none of these transactions be conducted in person in any market or place of public sale (*b*).

*Archbishops.*—An archbishop is the chief of the clergy in a whole province, and has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause. He has also his own diocese, wherein he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal. As archbishop, he calls the bishops into convocation by virtue of the King's writ; receives appeals from inferior jurisdictions within his province; becomes guardian of the spiritualities of the vacant sees within his province; and is entitled to present by lapse to all ecclesiastical livings in the disposal of his diocesan bishops, if not filled in six months. He hath also a power, by 25 Hen. 8, c. 21, of granting dispensations, which is the foundation of his granting special

licenses to marry at any place or time, to hold two livings, and the like.

*Bishops.*—A bishop hath power and authority, beside his sacred functions, to inspect the manners of the people and clergy, and to reform them by ecclesiastical censures, for which purpose he has several courts under him, which are holden by his chancellor, and may visit at pleasure every part of his diocese. It is also the business of a bishop to institute and to direct induction to all livings in his diocese. An archbishop or bishop is elected by the chapter of his cathedral church by virtue of a license from the Crown; and the form of granting a license to elect is the original of the *congé d'elire*. By the 25 Hen. 8, c. 20, it is enacted that at every avoidance of a bishopric, the King may send the dean and chapter his usual license to proceed to election, which is always accompanied with a letter missive from the King, containing the name of the person whom he would have them elect; and if they delay election above twelve days, the nomination shall devolve to the King, who may, by letters patent, appoint such person as he pleases (c). This election or nomination, if it be of a bishop, must be signified by the King's letters patent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops, requiring them to confirm, invest, and consecrate the person so elected; after which the bishop-elect shall sue to the King for his temporalities, shall make oath to the King and none other, and shall take restitution of his secular possessions out of the King's hands only.—Archbishoprics and bishoprics may become void by death, deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to

some superior, and therefore the bishop must resign to his metropolitan; but the archbishop can resign to none but the King himself.

*Dean and chapter.*]—A dean and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see. Every deanery in England is in the direct patronage of the sovereign, who may appoint, by letters patent, a spiritual person to be dean (*d*).

*Archdeacons.*]—An archdeacon hath an ecclesiastical jurisdiction immediately subordinate to the bishop throughout the whole of his diocese, or in some particular part of it. He is usually appointed by the bishop himself, and hath now, in general, a kind of episcopal authority, independent of, or rather concurrent with, the bishop.

*Rural deans.*]—The rural deans are very ancient officers of the Church, but almost grown out of use, though their deaneries still subsist, as an ecclesiastical division of the diocese or archdeaconry (*e*).

*Parsons or clergymen.*] — A parson, *persona ecclesiæ*, is one that hath full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person the Church, which is an invisible body, is represented, and he is in himself a body corporate, in order to defend and protect the Church by a perpetual succession. He is sometimes called the rector or governor of the Church, but the appellation of parson is the most legal, beneficial, and honourable title that a parish-priest can enjoy; for he only is said *vicem seu*

*personam ecclesiæ gerere.* A parson has, during his life, the freehold in himself of the parsonage-house, the glebe, the tithes, and other dues (*f*). But these are sometimes appropriated, that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living, whom the law esteems equally capable of providing for the service of the Church as any single clergyman. This appropriation may be severed, and the Church become disappropriate two ways. First, if the patron or appropriator presents a clerk who is instituted and inducted to the parsonage; for the incumbent so instituted and inducted is to all intents and purposes complete parson; and the appropriation being once severed, can never be reunited again, unless by a repetition of the same solemnities. And when the clerk so presented is distinct from the vicar, the rectory thus vested in him becomes what is called a sinecure; because he hath no cure of souls, having a vicar under him, to whom that cure is committed. Secondly, if the corporation which has the appropriation is dissolved, the parsonage becomes disappropriate at common law; because the perpetuity of person is gone, which is necessary to support the appropriation. Where a lay person has the patronage, he is usually styled an impropiator (*g*).

*Vicars.*—A vicar is a person who has the performance of spiritual duty, or cure of souls, and to whom a certain portion of the tithes or other emoluments of the Church, by way of exception out of those enjoyed by the appropriator is assigned. Some vicars are under a rector, who is entitled to the best part of the profits, and to whom he is in effect curate, with a standing salary. A rector so

circumstanced is commonly called a sinecure rector, or rector without cure of souls. However, by the 3 & 4 Vict. c. 113, it is provided that all ecclesiastical rectories without cure of souls in the sole patronage of the Crown, or of any ecclesiastical corporation, and having a vicar endowed or a perpetual curate, shall immediately upon the future vacancies thereof respectively be suppressed; all others may be sold to the Ecclesiastical Commissioners, and are then to be suppressed, but afterwards to be revived as rectories with cure of souls (*h*).

The method of becoming a parson or a vicar is much the same. Holy orders, presentation, institution, and induction, are necessary to both. By the common law a deacon of any age might be instituted and inducted to a parsonage or vicarage; but by 13 Eliz. c. 12, and 44 Geo. 3, c. 43, no person under twenty-three years of age, and in deacon's orders, shall be presented to any benefice with cure; and by 13 & 14 Car. 2, c. 4, no person is capable of being admitted to any benefice, unless he hath been first ordained a priest; and then he is, in the language of the law, a clerk in orders. Any clerk may be presented to a parsonage or vicarage, that is, the patron may offer him to the bishop to be instituted; but the bishop may refuse him if he is excommunicated and remains in contempt forty days, or if he be unfit. If the bishop has no objections, the clerk so admitted is next to be instituted by him, which is a kind of investiture of the spiritual part of the benefice; for by the institution the care of the souls of the parish is committed to the charge of the clerk. When the ordinary is also the patron, and confers the living, the presentation and institution are one and the same act, and are called a collation to a benefice.

By institution or collation the Church is full, so that there can be no fresh presentation till another vacancy, at least in the case of a common patron; but the Church is not full against the King till induction. Upon institution also, the clerk may enter on the parsonage-house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction. Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the parishioners due notice to whom their tithes are to be paid. This, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual; and when a clerk is thus presented, instituted, and inducted, he is then and not before in full and complete possession, and is called in law *persona impersonata*, or *parson imparsonée* (i). A parson or vicar may cease to be so—1st, by death; 2nd, by cession in taking another benefice under the circumstances after mentioned; 3rd, by consecration, which is when a clerk is promoted to a bishopric, except he obtains a *commendam*, which, however, is by the 6 & 7 Will. 4, c. 77, abolished for the future; 4th, by his resignation, accepted by the ordinary; 5th, by deprivation, either by canonical censures, or for some mal-feasance, as simony; maintaining doctrines in derogation to the King's supremacy, the thirty-nine articles, or the Book of Common Prayer; for neglecting to read himself in (as it is called) within two months after actual possession; for neglecting to read the liturgy, or take the abjuration oath; or for using any other form of prayer

than the liturgy: in all which and similar cases the benefice is *ipso facto* void, without any formal sentence of deprivation (*j*). Some benefices are acquired by donation, of which mention will be made when treating of advowsons.

*Curates.*.]—A curate is the lowest degree in the Church, being in the same state that a vicar was formerly, an officiating temporary minister, instead of a proper incumbent, though there are what are called *perpetual curacies*, where all the tithes are appropriated, and no vicarage endowed. The reader is referred to 3 & 4 Vict. c. 113, before mentioned, for some provisions as to perpetual curacies. By the 1 & 2 Vict. c. 106, provisions are made for the appointment and payment of curates during an incumbency, whereby the bishop has power in certain cases to appoint a curate. Disputes respecting the curate's stipend are to be determined by the bishop (*k*).

*Residence of clergy.*.]—By the 1 & 2 Vict. c. 106, every spiritual person (with some exceptions and modifications) holding a benefice, shall keep residence on his benefice, and a house of residence belonging thereto; and if he absents himself therefrom for a period exceeding three months in any one year, he shall forfeit, unless resident at some other of his benefices, a certain portion of the annual value of his benefice (*l*).

*Holding two benefices.*.]—We have above alluded, in a general manner, to the effect of holding more than one benefice, and it may now be stated more particularly that by 1 & 2 Vict. c. 106, it is enacted that in future no spiritual person holding any benefice with cure of souls shall take to hold therewith any



other benefice with cure of souls, unless situated within ten statute miles of the first; that no spiritual person holding a benefice with cure of souls, with a population of more than 3,000, shall take to hold therewith any other having a population of more than 500, nor *vice versa*; that no spiritual person shall hold together any two benefices with cure of souls of the joint value of more than £1,000 *per annum*, &c.; otherwise the previous benefice is *ipso facto* void. The Archbishop of Canterbury may, however, grant a dispensation (*n*).

*Churchwardens.*.]—Churchwardens are the guardians or keepers of the Church, and representatives of the body of the parish. They are sometimes appointed by the minister, and sometimes by the parish in vestry assembled, and sometimes by both together, as custom directs. They are a kind of corporation, and are enabled by that name to have a property in goods and chattels, and to bring actions for the use and profit of the parish. The churchwardens (with the overseers) are also a quasi corporation, for the purpose of holding real property belonging to the parish (*o*). They may be removed, and then, or at the end of their year, called to account. Their office is to repair the church, and to make rates and levies for that purpose (*p*). They are also joined to the overseers in the maintenance of the poor. They are empowered to keep persons orderly while they are in church during divine service (*q*).

*Parish clerks and sextons.*.]—Parish clerks and sextons are also regarded by the common law as persons who have freeholds in their offices; and, therefore, though they may be punished, they could

not formerly be deprived by ecclesiastical censures; but by 7 & 8 Vict. c. 59, a parish clerk may be suspended or removed by the archdeacon for misconduct or neglect. The parish clerk is generally appointed by the incumbent, but by custom may be chosen by the inhabitants; and if such custom appear, the Court of King's Bench will grant a *mandamus* to the archdeacon to swear him in (*s*).

## CHAP. IX.

### OF THE CIVIL STATE.

[See 1 Black. Com. ch. 12; 3 Steph. Com. Bk. IV., pt. 1. ch. 9.]

The laity, as contradistinguished from the clergy, may be divided into three distinct states, viz., the civil, the military, and the maritime, which two latter will be considered in the next chapter. The civil state includes all orders of men, from the highest nobleman to the meanest peasant, not included under the description of the clergy, or of the military or maritime states; and it may sometimes include individuals of the other three orders, since a nobleman, a knight, a gentleman, or a peasant, may become either a divine, a soldier, or a seaman. The civil state consists of the nobility and the commonalty. The degrees of nobility now in use are, dukes, marquises, earls, viscounts, and barons.

*Dukes.*—A duke, as a mere title of nobility, is inferior in point of antiquity to many others, yet is superior to all in point of rank, being the first title of dignity after the Royal Family.

*Marquises.*—A marquis is the next degree of nobility. His office formerly was to guard the

frontiers and limits of the kingdom, which were called marches, from the Teutonic word *marche*, a limit.

*Earls.*—An earl is a title of nobility so ancient, that its original cannot be clearly traced out. It is now become a mere title, earls having nothing to do with the Government of the county, though formerly they had. In writs and commissions, and other formal instruments, the King, when he mentions any peer of the degree of an earl, usually styles him “trusty and well-beloved cousin”—an appellation as ancient as the reign of Henry IV.

*Viscounts.*—A viscount is an arbitrary title of honour, which never had any shadow of office belonging to it. The first instance of the title was in the reign of Henry VI.

*Barons.*—A baron is the most general and universal title of nobility; for originally every one of the peers of superior rank had also a barony annexed to his other titles. But it hath sometimes happened that, when an ancient baron hath been raised to a new degree of peerage, in the course of a few generations the two titles have descended differently—one perhaps to the male descendants, the other to the heirs general—whereby the earldom, or other superior title, has subsisted without a barony; and there are also modern instances where earls and viscounts have been created without annexing a barony to their other honours; so that now the rule does not universally hold that all peers are barons. The most probable opinion of the origin of baronies is, that they were the same with our present lords of manors.

The right of peerage seems to have been ori-

ginally territorial, that is, annexed to lands, honours, castles, manors, and the like, the proprietors and possessors of which were (in right of their estates), allowed to be peers of the realm, and were summoned to Parliament to do suit and service to their sovereign; and when the land was alienated, the dignity passed with it as appendant. Thus, the bishops still sit in the House of Lords, in right of succession to certain ancient baronies annexed, or supposed to be annexed, to their episcopal lands (*a*). But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of territorial became personal. Actual proof of a tenure by barony became no longer necessary to constitute a lord of Parliament; but the record of the writ of summons to him or his ancestors was admitted as a sufficient evidence of the tenure.

Peers are now created by writ or by patent; for those who claim by prescription must suppose either a writ or patent made to their ancestors. The creation by writ, or the King's letter, is a summons to attend the House of Peers, by the style and title of that barony which the King is pleased to confer; that by patent is a royal grant to a subject of any dignity or degree of peerage. The creation by writ is the more ancient way; but a man is not ennobled thereby, unless he actually takes his seat in the House of Lords. The most usual way is to grant the dignity by patent, which enures to a man and his heirs according to the limitations thereof, though he never himself makes use of it. It is frequent to call up the eldest son of a peer to the House of Lords by writ of summons, in the name of his father's barony, because in that case there is no danger of his children's losing the nobility, in case he never takes his seat, for they will succeed to their grandfather.

A nobleman shall be tried (except in misdemeanors) by his peers; but this does not extend to bishops, who, though they are lords of Parliament, are not ennobled in blood, and consequently not peers with the nobility. By 20 Hen. 6, c. 9, peeresses, either in their own right or by marriage, shall be tried before the same judicature as peers of the realm. If a woman noble in her own right marries a commoner, she still remains noble, and shall be tried by her peers; but if she be only noble by marriage, then by a second marriage with a commoner she loses her dignity; for as by marriage it was gained, by marriage also it is lost. Yet if a duchess dowager marries a baron, she continues a duchess still, for all the nobility are *pares*, and therefore it is no degradation. A peer or peeress cannot be arrested in civil cases (*b*). A peer sitting in judgment gives not his verdict upon oath, like an ordinary juryman, but upon his honour. Bills in chancery also he answers upon his honour. But when he is examined as a witness in either civil or criminal cases, he must be sworn. A peer cannot lose his nobility but by death or attainder. However, it seems that a dignity or title of honour may be taken away (even where there is no deficiency or corruption of blood) by the express words in an act of Parliament. In a late case it was held that the Irish Act, 28 Hen. 8, c. 3, vesting in the King, in right of the Crown of England, all honours, manors, castles, seignories, jurisdictions, and all other possessions and hereditaments held by certain persons, or by any person to the use of any of them in Ireland, did not take away from any of them a personal dignity; and that the opinion of Lord Coke and other judges, that it took away the earldom of Waterford, was erroneous in fact and in law (*c*).

*Commonalty.*]—The commonalty, like the

nobility, are divided into several degrees. They are, 1, Knights of the order of St. George, or of the Garter, first instituted by Edward III. 2, Knights Banneret, who, if created by the King in person, in the field, under the royal banner in time of open war, rank next after barons, and before the sons of viscounts; but otherwise they rank after Baronets. 3, Baronets, which title is a dignity of inheritance, created by letters patent, and usually descendible to the issue male. 4, Knights of the Bath; an order instituted by Henry IV., and revived by George I. They are so called from the ceremony of bathing the night before their creation. 5, The last of these inferior nobility are, Knights Bachelors, the most ancient, though the lowest order of knighthood among us.—These, says Sir Edward Coke, are all the names of dignity in the kingdom, esquires and gentlemen being only names of worship (*d*).

## CHAP. X.

## OF THE ROYAL FORCES.

[See Black. Com. ch. 13; 2 Steph. Com. Bk. IV. pt. 1, ch. 8.]

Under the general denomination of the royal forces, are included the military and maritime, or naval states or orders.

*Military.*—The military state includes the whole of the soldiery, or such persons as are peculiarly appointed among the rest of the people for the safeguard and defence of the realm. Soon after the restoration of King Charles II., it was thought proper to recognise the sole right of the Crown to govern and command the militia; the laws relating to which are now, though only partially, in force (*a*). It is one of the articles of the Bill of Rights, that the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against law; but it has for many years past been annually judged necessary by the Legislature to maintain, even in time of peace, a standing body of troops under the command of the Crown, who are, however, *ipso facto* disbanded at the expiration of every year, unless continued, as



is now uniformly done, by Parliament regulating the manner in which this body of troops are to be provided for (*b*).

*Royal Navy.*]—The maritime state is nearly related to the former, and consists of all such persons as have appointments or services in the royal navy. Many laws have been made for the supply of the navy with seamen; for their regulation when on board; and to confer privileges and rewards on them during and after their service.—First, for their supply, the King is empowered to grant commissions for impressing them; but by 5 & 6 Will. 4, c. 24, no person can be detained in the royal navy against his will for a longer period than five years, except in case of emergency. Great advantages, also, are given to volunteer seamen, in order to induce them to enter into her Majesty's service; and every foreign seaman who, during a war, shall serve two years on board an English ship, is *ipso facto* naturalised. But fishermen, ferrymen, and Thames watermen, are, under certain circumstances, protected from being impressed (*c*). Secondly, the method of ordering seamen in the royal fleet, and keeping up a regular discipline there, is directed by certain acts of Parliament, in which almost every possible offence is set down (*d*). Thirdly, with regard to the privileges conferred on sailors, they are pretty much the same with those conferred on soldiers; being provided for, when maimed, wounded, or superannuated, either by county rates, or Greenwich Hospital; and no seaman on board her Majesty's ships can be arrested for any debt less than thirty pounds (*e*); besides this, they have the power of making *nuncupative testaments* (*f*).

## CHAP XI.

## SUBORDINATE MAGISTRATES.

[See 1 Black. Com. ch. 9; 3 Steph. Com. Bk. IV., pt. 1. ch. 10.]

The sovereign, we have seen, is the supreme magistrate of the realm, and all others are consequently subordinate.—We proceed to treat of these latter, reserving, however, the subject of the judges of the superior courts of Westminster till we notice the courts of the realm.

*Sheriffs.*.]—The sheriff is an officer of very great antiquity in this kingdom, and performs all the King's business in the county; the King committing *custodiam comitatus* to the sheriff, and him alone. Sheriffs, except where the shrievalty is of inheritance, were formerly chosen by the inhabitants of the several counties; but it has been provided by various statutes that sheriffs shall be assigned and elected by the chancellor, treasurer, president of the King's council, chief justices, chief barons, all the judges and great officers of state, on the morrow of All Souls in the Exchequer (which is now altered to the morrow of St. Martin), where they

propose three persons to the King, who afterwards appoints one of them to be sheriff. The appointment is notified in the *London Gazette*, and the clerk of the privy council makes out a warrant, which, being received by the sheriff, enables him to act upon taking the oath of office (a). The office of sheriff cannot be determined until a new sheriff be named, unless by his own death or the lapse of six months after the demise of the King, unless sooner displaced by the successor. By 1 Rich. 2, c. 11, no man that has served the office of sheriff for one year can be compelled to serve the same again within three years after. The power and duty of a sheriff are either as a judge, as a keeper of the King's peace, as a ministerial officer of the superior courts of justice, or as the King's bailiff. In his *judicial* capacity he is to hear and determine all causes of forty shillings value or under, in his county court, the greater part of which is now, however, taken away by the new County Courts, instituted under the 7 & 8 Vict. c. 95 (b). He also tries issues sent out of the superior courts in debts under £20 (c); also takes inquiries and inquisitions directed to him (d); he is likewise to determine the elections of knights of the shire, of coroners, and of verderers; to judge of the qualification of voters, and to return such candidates as he shall determine to be duly elected. As the *keeper of the King's peace*, both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein during his office. He may apprehend and commit to prison all persons who break the peace, or attempt to break it, and may bind any one in a recognizance to keep the King's peace. He may, and is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody.

He is also to defend his country against any of the King's enemies, when they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him, which is called the *posse comitatus*, or power of the county; which summons every person above fifteen years old, and under the degree of a peer, is bound to attend, upon warning, under pain of fine and imprisonment.—In his *ministerial* capacity, the sheriff is bound to execute all process issuing from the King's courts of justice. In civil causes he is to arrest, to take bail, to summon and return the jury, and to see the judgment of the law carried into execution. In criminal matters, also, he arrests, imprisons, he summons the jury, has the custody of the delinquent, and executes the sentence. As the *King's bailiff*, it is his business to preserve the King's rights within his bailiwick, by seizing all lands devolved to the Crown by attainder or escheat; by levying all fines and forfeitures; by seizing and keeping all waifs, wrecks, estrays, and the like; and by collecting the King's rents within his county, when commanded by process from the Exchequer.

*Under Sheriff.*—The under sheriff is the sheriff's deputy, and usually performs all the duties of the office. He is appointed by the sheriff, by writing under his hand, within one month after the latter's appointment. The under sheriff must have an office, or a deputy residing, within a mile of the Inner Temple Hall, for the receipt of writs, &c. (e).

*Sheriffs' Officers.*—Bailiffs or sheriffs' officers are either bailiffs of hundreds or special bailiffs. The former are officers appointed over their respective districts by the sheriffs, to collect fines therein, to

summon juries, to attend the judges and justices at the assizes and quarter sessions. The latter are generally mean persons employed by the sheriffs to make arrests and executions; and, being usually bound to the sheriff for the due execution of their office, are called *bound bailiffs*. The sheriff sometimes, on the application of the party, will make a special bailiff for a particular arrest (*f*).

*Gaolers.*—Gaolers are officers under the sheriff, who is responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant; and if they suffer any such to escape, the sheriff must answer it to the King if it be a criminal matter, or in a civil case to the party injured.

*Coroners.*—The coroner is an officer of the King that hath cognisance of some pleas of the Crown. He is to be elected in full county court by the freeholders, upon the King's writ *de coronatore eligendo*, and ought to have lands in fee in the county to answer all people. The number of coroners is not fixed; in some counties there are four, besides several special coroners in divers liberties and privileged places, as the coroner of the verge, &c.; and by charter, several corporations have power to choose coroners for their precincts. By the 7 & 8 Vict. c. 92, coroners may be appointed for districts within counties; and by 5 & 6 Will. 4, c. 76, ss. 62, 64, the council of every borough having separate quarter sessions may appoint a coroner for the borough. The chief justice of the King's Bench is the sovereign coroner of the realm, and may view a body and record it wherever he is. The power of coroner is either judicial or ministerial. The judicial authority of

coroner, both general and special, is to inquire into the cause by which any person came to a violent death, to pronounce judgment upon outlawries in the county court, to take and enter appeals of murder, &c. He may also inquire of the escape of a murderer, of treasure-trove, and wreck; but of no felony, except of the death of a man, and upon view of the body. The ministerial power of the coroner is only as the sheriff's substitute, to execute such process as may be directed to him, upon a just exception made against the sheriff (*g*). The coroner is chosen for life, but may be discharged by the King's writ *de coronatore exonerando*, for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, hath not a sufficient estate in the county, or lives in an inconvenient part of it. By 25 Geo. 2, c. 29, which points the mode in which his inquisition is to be taken, extortion, neglect, or misbehaviour, are also made causes of removal. By the 6 & 7 Vict. c. 83, coroners of counties may in cases of illness, &c., appoint, subject to Chancellor's approbation, a deputy.

*Justices of the peace*].—Justices of the peace are persons appointed by the King's commission to keep the peace of the county, city, or borough for which they are appointed. Most of them are made of the *quorum* from the words of the commission, "*quorum aliquem vestrum A. B. C. D. et unum esse volumus*;" because some business of importance shall not be dispatched without them, or one of them. When any justice intends to act under this commission, he sues out a writ of *dedimus potestatem* from the clerk of the Crown in Chancery, empowering certain persons therein named to administer the usual oaths to him; for until this be

done, he is not at liberty to act. By 18 Geo. 2, c. 20, every justice (except as it is therein excepted) shall have £100 *per annum*, clear of all deductions; and if he acts without such qualification he shall forfeit £100. It must be observed that official acts done by a justice not properly qualified are not therefore void, though he acts at his own peril (*h*); and no practising attorney or solicitor is capable of acting as a justice of the peace for any county. The office of these justices is determinable, 1, by demise of the Crown—that is, six months after; 2, by express writ under the great seal; 3, by superseding the commission by writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it; for it may be again renewed by *procedendo*; 4, by a new commission, which virtually, though silently, discharges all former justices that are included therein; for two commissions cannot subsist at once; 5, by accession of the office of sheriff. Their power is pointed out by the words of the commission, and by particular statutes. They are conservators of the peace, acting alone, and sitting as a court of quarter sessions; they hear and determine some felonies and other offences. Besides the jurisdiction which the justices of each county at large exercise, in these and other matters at the quarter sessions, authority is moreover given by various statutes to the justices acting for the several divisions into which counties are for that purpose distributed, to transact different descriptions of business (such as licensing alehouses, or appointing overseers of the poor or surveyors of highways) at special sessions; and two justices, or in some cases even a single magistrate, are also frequently empowered by statute to try in a summary way, and without jury, such minor

offences as in the statute particularised; the meeting of two or more justices for which purposes (as for some others also) is denominated a petty session.

It may be observed that there are many statutes made to protect him in the upright discharge of his office, which among other privileges prohibit such justices from being sued for any oversights without notice beforehand, or after the expiration of six months from the commission of the injury, and stop all suits begun on tender made of sufficient amends. But, subject to these legislative protections, a justice of the peace is liable to an action by the party injured for illegal acts done by colour of his office (i). He is also liable to be prosecuted criminally, by indictment or information, if guilty of any corrupt or malicious abuse in the exercise of his judicial discretion; but when he acts fairly and *bonâ fide*, leave will not be granted to file an information against him on account of a mere error in his proceedings (j).

*Constables, &c.*] — Constables are officers appointed for the preservation of the peace in hundreds, parishes, and towns. They are of two sorts, high constables and petty constables. The former are appointed at the court leets of the franchise or hundred over which they preside; or, in default of that, by the justices at their special sessions. The petty constables are inferior officers, formerly chosen in the same manner, in every town and parish, subordinate to the high constable of the hundred, and including in their official character the characters of headborough, tithing-man, or bors-holder. However, by the 5 & 6 Vict. c. 109, no petty constable, headborough, &c., shall be appointed at any court leet or tourn, except for the



performance of duties unconnected with the preservation of the peace. The justices are by the act to issue annually precepts to the overseers to return a list of persons competent to serve as constables, whereupon the justices are to revise the list, and choose such a number to act as constables as they shall think fit. In London and the adjoining parts, as also in municipal boroughs, constables are appointed in a different manner, and have more onerous duties to perform. The 5 & 6 Vict. c. 109, does not extend to parishes levying rates for the payment of constables under 3 & 4 Will. 4, c. 98, or under any local act, nor to Chester. In addition to the above, there is power by 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, to appoint (if necessary), a chief constable, who may appoint the other constables, as also a superintendant (*k*).

By the 2 Will 4, c. 41, and 5 & 6 Will 4, c. 43, power is given to swear in *special* constables for a limited period where any tumult &c., may be apprehended.

*Surveyors of the highways.*—Every parish is bound of common right to keep the high-roads that go through it in good and sufficient repair, unless, by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person; and for this purpose a surveyor of the highways is by the Highway Act, 5 & 6 Will. 4, c. 5 (amended by 4 & 5 Vict. cc. 51, 59), to be appointed annually by the inhabitants in vestry assembled; or, in case of a neglect, then by the justices at a subsequent special sessions (?). Two or more parishes may unite and appoint a district surveyor. If the surveyor do not keep the highway in proper repair he is liable to a fine of £5, and to a farther forfeiture in case of continued neglect.

It may be mentioned here that turnpike roads are not within the Highway Act, but are under the management and care of trustees or commissioners, who are empowered to erect toll gates, and to levy tolls from passengers to defray the expense of repairs and improvements (*m*).

*Overseers.*—Overseers of the poor are by 43 Eliz. c. 2, to be nominated yearly in Easter week, or within one month after (though a subsequent nomination will be valid), by two justices dwelling near the parish. They must be substantial householders, and so expressed to be in the appointment of the justices. Their office and duty are principally to raise relief for the poor, and to provide employment for such of them as are able to work; for which purpose they are empowered to make and levy rates upon the several inhabitants of the parish.

However, the overseers are now much controlled by other officers.—For by the 4 & 5 Will. 4, c. 76, the superintending administration of the law relating to the relief of the poor was committed to three commissioners and their assistants, but they are now superseded by commissioners under 10 & 11 Vict. c. 109. By that statute the executive consists of four executive commissioners, who are cabinet ministers, and other commissioners to be appointed by letters-patent, of whom the commissioner first named is to be the “president.” He is the only salaried commissioner, and may in many cases act alone. There are to be two secretaries, one of whom as well as the president may sit in the House of Commons. Acting under the commissioners are guardians of the poor for parishes and for unions, which latter are parishes consolidated by order of the commissioners into one body, having a common workhouse. Some unions are also formed

for the purposes of settlement, when they become in fact one parish (*n*).

A settlement under the 4 & 5 Will. 4, c. 76, is acquired by the following methods:—1. By birth. But if the parent can be proved to have acquired a settlement, either by birth or otherwise, in another parish, then the *prima facie* settlement of the child will be superseded by a derivative one or a settlement. 2. By parentage. For all legitimate children take the last settlement of the father, and after his death, of the mother, till they are emancipated from parental authority by marriage, or by attaining the age of twenty-one, and living permanently separate from the parent, or contracting some relation inconsistent with domestic subjection. And when emancipated, they retain the parental settlement last acquired before that event took place. A bastard child (having in the eye of the law no parent), if born since the Poor Law Amendment Act, 4 & 5 Will. 4, c. 76, follows the settlement of his mother, or if she marry of his father-in-law, until he attains the age of sixteen, or gains another for himself. 3. But besides those of birth or parentage, there are also settlements acquired by the party's act. For a female gains a derivative settlement by marriage, *i. e.*, she may claim the settlement which belongs to her husband, and she retains that settlement after his death. If the man has no settlement (being born abroad, and having acquired none), or his settlement is unknown, she retains that which belonged to her before her marriage, but she cannot in any case acquire one in her own right during marriage. A settlement may also be acquired: 4. By renting a separate tenement of £10 a year, coupled with residence in the same parish for forty days. 5. A settlement may also be gained by being bound apprentice under indenture

or other deed, and inhabiting for forty days under such binding either in the same parish where the service takes place, or a different one. But no settlement can be acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas, as a fisherman or otherwise. The deed must in all cases be executed by the apprentice, except in the case of parish apprentices. 6. A settlement is gained of a temporary kind in any parish by having an estate of one's own there of whatever value, and whether the interest be legal or equitable. 7. A settlement may be gained by being charged and paying the public taxes and levies of the parish, excepting those for scavengers and highways, and the duties on houses and windows. But it is provided by 35 Geo. 3, c. 101, s. 4, that no person shall gain a settlement on this ground in respect of any tenement or tenements not being of the yearly value of £10, and by 6 Geo. 4, c. 57, that a settlement shall not be acquired by paying parochial rates for any tenement (not being the person's own property), unless it consists of a separate and distinct dwelling-house or building, or land, or both, *bonâ fide* rented by him for £10 a year at the least for a whole year, and be occupied under such hiring for a year at least. Prior to the Poor Law Amendment Act (4 & 5 Will. 4, c. 76), a settlement might also have been obtained by 40 days' residence if accompanied by—1. Having service for a year; 2. By executing a public annual office or charge within the parish for 12 months. Further, a settlement by renting might have been had without payment of, or being assessed to, the poor rate. Questions frequently arise as to these modes of settlement, and will do so for some time to come (*o*). The poor are to be confined to their respective parishes, so that each parish may bear its

own burthens, though as between the parishes of a union for settlement this is unimportant. An order of removal to the proper parish may be obtained by the overseers from two justices of the peace. Notice of the order and of the examinations must be sent to the parish to which the removal is to be made, who may appeal to the quarter sessions against it within 21 days from notice, and then the pauper is not to be removed until the question is decided. The appeal may be also after actual removal. The sessions may reserve a special case for the superior Court of Queen's Bench (*p*).

It should be stated, however, that by the 9 & 10 Vict. c. 66 (amended by 10 & 11 Vict. c. 110), no person (with certain exceptions) is to be removed, nor is any warrant to be granted for the removal of any person from any parish in which such person shall have resided for five years next before the application for the warrant (*q*).

## CHAP. XII.

## CORPORATIONS.

[See 1 Black. Com. ch. 18; 3 Steph. Com. Bk. IV., pt. 3, ch. 1.]

Having enumerated the several characters under which persons in their relative capacities are considered as public officers, we proceed to consider those persons distinguished by the name of corporations, or bodies politic.

A corporation is a person, in a political capacity, created by the law, and is a body politic framed by policy and fiction to endure in perpetual succession; for as all personal rights die with the natural person, and as the necessary forms of investing a series of individuals one after another with the same individual rights would be very inconvenient, if not impracticable, it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. The first division of corporations is into aggregate and sole.

*Corporations aggregate.*—Corporations aggre-

gate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever, as mayor and commonalty, dean and chapter, master and fellows of a college, &c.

*Corporations sole.*.]—Corporations sole consist of one person only and his successors in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had—as a king, a bishop, a dean of some chapter, an archdeacon, a prebendary, parson, vicar, the chamberlain of London, and the heads of several hospitals.

Another division of corporations, either sole or aggregate, is into ecclesiastical and lay.

*Ecclesiastical corporations.*.]—Ecclesiastical corporations are when the members that compose it are entirely spiritual persons, such as bishops, certain deans, prebendaries, archdeacons, parsons, and vicars, which are sole corporations; deans and chapters, and the like, which are bodies aggregate.

*Lay corporations.*.]—Lay corporations are of two sorts, civil and eleemosynary. The civil are such as are erected for a variety of temporal purposes—as the King, to prevent any interregnum or vacancy of the throne; a mayor and commonalty, bailiff and burgesses, and the like, for the advancement and regulation of manufactures and commerce. The eleemosynary sort are such as are constituted for the perpetual distribution of free alms, or bounty of the founder of them, to such persons as he has directed—as all hospitals, colleges, &c.

*Creation of corporations.*—A corporation may be created by the common law, by the King's charter, by act of Parliament, and by prescription. When a corporation is created, a name is always given to it, and by that name alone it must sue and be sued, and do all legal acts; for the name is the very being of its constitution, and though it is the will of the King that erects the corporation, yet the name is the knot of its combinations, without which it could not perform its corporate functions (*a*).

*Rights, privileges, &c., of corporations.*—When a corporation is duly created, all other incidents are tacitly annexed to it—as, 1. To have perpetual succession, and therefore all aggregate corporations have a power, necessarily implied, of electing members in the room of such as go off. 2. To sue and be sued, implead or to be impleaded, grant or receive by its corporate name, and do all other acts, as natural persons may. 3. To purchase lands, and hold them for the benefit of themselves and their successors, and to have a common seal. 4. To make bye laws, or private statutes, for the better government of the corporation. An aggregate corporation must always appear by attorney; it cannot be made plaintiff or defendant in action of battery, or for the like personal injuries; but it may maintain an action for slander and libel on them when carrying on trade; also for breach of contract, and in some cases may be sued in such action as a defendant; it is also liable to an action for damages in respect of any tortious acts committed by its agents, and is even liable in certain cases to an indictment, as where it allows a bridge, the repair of which belongs to it by law, to fall into decay (*b*). It cannot commit treason or felony or other crime in its corporate capacity, though its members may in their individual capacities; it is not capable of suffering a



traitor's or a felon's punishment, for it is not liable to corporate penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties. It cannot be seised of lands to the use of another; neither can it be committed to prison, and therefore cannot be outlawed. It cannot be excommunicated or summoned into the ecclesiastical courts on any account; but an aggregate corporation may take goods and chattels for the benefit of themselves and successors, which a sole corporation cannot do. In ecclesiastical or eleemosynary corporations, the King or founder may mark out the rules and ordinances they shall observe; but corporations instituted for civil purposes are only subject to the common law, and their own bye-laws not repugnant to the laws of the realms. Aggregate corporations, also, that have by their constitution a head, as a dean, warden, or master, cannot do any acts during the vacancy of the headship except only appointing another; but there may be a corporation aggregate without a head, as the governors of the Charter-house. In aggregate corporations also the act of the major part is esteemed the act of the whole. Formerly, by an express exception in the 32 Hen. 8, c. 1 (see p. 219), no corporation of any description could take a devise of lands, except by 43 Eliz. c. 4, for charitable uses, which exception was narrowed by the 9 Geo. 2, c. 36, commonly called the Mortmain Act. But as the new Wills Act (p. 220) has repealed the 32 Hen. 8, c. 1, and corporations are not excepted, they can now take lands as devisees, subject to the 9 Geo. 2, c. 36 (p. 190), and to the obtaining the crown's license to enable them to *hold* same (c).

*Visitors of corporations.*—The ordinary is the visitor of all ecclesiastical corporations; and the

founder, his heirs and assigns, of all lay corporations of the eleemosynary kind. As to a civil lay incorporation, it has strictly no visitor, but its abuses may be corrected in the Court of Queen's Bench (*d*).

The determination of a visitor is final, and is not examinable in any court (*e*).

*Dissolution of corporations.*—A corporation may be dissolved—1. By act of Parliament. 2. By the natural death of all its members, in cases of an aggregate corporation. 3. By failure of members to the extent requisite to the validity of corporate elections according to the charter. 4. By surrender of its franchises into the hands of the King. 5. By forfeiture of its charter through negligence or abuse of its franchises, in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void; and the regular course is, to bring an information in nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings (*f*).

Particular provisions are made for the dissolution of trading corporations.

*Municipal corporations.*—There are two kinds of corporation of so peculiar and important a nature as to require separate notice. These are municipal corporations and trading or joint-stock companies. Municipal corporations are regulated by the 5 & 6 Will. 4, c. 76, as explained and amended by subsequent acts. The corporate towns, or, as they are now denominated, boroughs, of England and Wales are (with certain exceptions) placed under one uniform constitution. There is to be elected

annually a mayor, and periodically a certain number of aldermen and of councillors, who together constitute the council of the borough. The council meet once a quarter (or oftener), for transaction of the general business of the borough, to make bye-laws, elect auditors and assessors, &c. The council may petition for a separate court of quarter sessions, in which case the Crown appoints a recorder, and the council a coroner and a clerk of the peace. The council cannot in general sell or mortgage the land as public stock of the borough, or demise them for more than a certain term. The rents and profits of all corporate property are to be paid to the treasurer, and applied to corporate purposes—the surplus (if any) being expended for the public benefit, whilst any deficiency is to be made up by a rate (*g*).

*Trading corporations.*—By the 7 Will. 4, and 1 Vict. c. 73, the Queen is empowered by letters patent to grant to any company or body of persons associated for any trading or other purposes certain privileges, and by 7 & 8 Vict. c. 100, commonly called the Joint-Stock Companies Act, trading companies, when completely registered, are to be considered as completely incorporated for many purposes, but individual shareholders are to be held liable, if the corporate property do not suffice, though not after three years from ceasing to be a shareholder. By 7 & 8 Vict. c. 111, such and other like companies are to be liable to a fiat in bankruptcy, and may be dissolved (*h*).

## CHAP. XIII.

## MASTER AND SERVANT.

[See 1 Black. Com. ch. 14; 2 Steph. Com. Bk. III, ch. 1.]

We have now to consider persons in the relative capacities of master and servant, husband and wife, parent and child, guardian and ward. And, firstly, of master and servant:—

Servants are of several kinds. The first sort are menial servants, so called from being *intra mœnia*, or domestics living within the walls of the house. The contract or relation arises from the hiring; and if a master retains a clerk or servant (not being a menial one) generally, without expressing any time, the law construes it to be for a year, but the contract may be for a longer or shorter term. If the servant be a menial one, and there be no express agreement to the contrary, either party may determine the service upon a month's warning or upon payment of a month's wages (*a*). By various statutes, all single men between twelve years old and sixty, and married men under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, are compellable by two justices to go out to service in husbandry, or

certain specific trades; and on every general hiring for a year, a quarter's warning must be given before the contract can be dissolved, unless upon reasonable cause, to be allowed by a justice of the peace; but they may part by consent, or make a special bargain. Justices are also empowered to determine differences arising between such labourers and their masters (b).

The second kind of servants are apprentices, who are bound by indenture, with their own consents, or by the agreement of their friends, to serve for a certain number of years in some trade, upon condition that the master shall, during the time, instruct them in his art or mystery. By several statutes the children of poor persons may be apprenticed out by the overseers, with the consent of two justices, till twenty-one years of age, to such persons as are thought fitting, who are compellable to take them; and gentlemen of fortune and clergymen are equally liable with others to such compulsion, for which purposes the statutes have made the indenture obligatory, though such parish apprentice do not execute them. By the statutes, justices have power to discharge apprentices to trades, either at the request of themselves or masters, and to direct restitution of a rateable share of the money given with the apprentice; and parish apprentices may be discharged in the same manner by the justices (c).

Another species of servants are, stewards, factors, and bailiffs, for these persons are considered by the law as servants, with regard to such of their acts as affect their masters' or employers' property. More commonly, however, they are looked on and treated as *agents* (d).

A master may correct his apprentice, so that it be done with moderation, but not any other servant.

So a master may support or maintain his servant in any action at law against a stranger, or may bring an action against another for beating or maiming him, assigning, as a ground for the action, a loss of services, or may even, it is said by some, justify an assault in his defence, but this seems not supportable (e); and if any person knowingly hire the servant of another, the first master may have an action to recover damages for the loss of his service, both against the servant and the person hiring him (f). But a master is answerable for the act of his servant, if done by his command, either expressly or impliedly given—*nam qui facit per alium, facit per se*; and therefore if a servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it as well as the servant. Whatever a servant is permitted to do in the usual course of his master's business is equivalent to a general command, and the master will be bound thereby (g). If a servant, by his negligence, does any damage to a stranger, the master shall answer for his neglect: as if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage must be done while he is actually employed in his master's service, otherwise a master is not liable (h).

## CHAP. XIII.

## HUSBAND AND WIFE.

[See 1 Black. Com. ch. 15; 2 Steph. Com. Bk. III., ch. 2.]

*Marriages.*—The law considers marriage in no other light than a civil contract, and therefore, like all other contracts, it is good when the parties at the time of making it were willing to contract, able to contract, and actually did contract, in proper form of law. As to the first, the maxim is, that *consensus, non concubitus, facit nuptias* (a). As to the second, all persons are able to contract themselves in marriage, unless they labour under what were formerly considered the canonical disabilities of consanguinity, or relation by blood, and affinity or relation by marriage, and some particular corporal infirmities. These latter disabilities only render the marriage voidable, and not *ipso facto* void; and it was formerly so with the first kind of disabilities, but by 5 & 6 Will. 4, c. 54, all future marriages between persons within the prohibited degrees of consanguinity or affinity are absolutely void (b). Another disability is that termed the civil disability of a prior marriage, as having another husband or wife living, of being under age, of wanting the con-

sent of parents or guardians, and of being insane. As to the third, no marriage actually performed is by the temporal law *ipso facto* void (except under the 5 & 6 Will. 4, c. 54), that is, celebrated by a person in orders in a parish church or public chapel (or elsewhere by special dispensation), in pursuance of banns, or a license, between single persons consenting, of sound mind, and of the age of twenty-one years, or of the age of fourteen in males, and twelve in females, if their parents or guardians do not dissent (*b\**). By the 4 Geo. 4, c. 76, it is provided that when a valid marriage by license or banns is solemnised between persons either of whom is under age, by means of the false oath or fraudulent procurement of one of the parties, the party so offending shall be liable to forfeit all property which would otherwise accrue from the marriage (*c*). We have hitherto spoken of marriages in churches by persons in holy orders, but as some persons have objection to be so married, the 6 & 7 Will. 4, c. 85, was passed, whereby it was provided that the officer called the superintendent registrar, appointed for every poor-law union, parish, or place, under the act of 6 & 7 Will. 4, c. 86, passed "for registering births, deaths, and marriages in England," shall be the superintendent registrar of marriages therein; and the act establishes (in effect) two new modes of proceeding to celebrate marriage, in addition to those sanctioned by the Marriage Act (4 Geo. 4, c. 76), that is, it allows besides the marriage by special license, by the surrogate's license, and by banns (which were the old modes), a marriage by the superintendent registrar's certificate, without license, or by his certificate, with license (*d*). The provisions of the act are too numerous to be here stated. The 10 & 11 Vict. c. 58, renders valid marriages of Jews and Quakers respectively prior to 1 July, 1837,



in England, or in Ireland prior to 1845 (e). With respect to marriages contracted by British subjects in Scotland or Ireland, or in any foreign country, they are considered as valid by our law, if made in such form as is deemed sufficient in the place where contracted, and the case appears to be the same though the parties eloped to that country on purpose to evade the laws of marriage in this. It is also provided by 4 Geo. 4, c. 91, that marriages solemnised by a clergyman in the chapel or house of an ambassador, or the chapel of a British factory abroad, or by a chaplain or other person officiating by authority within the lines of a British army abroad, shall be as valid as if solemnised at home. It has been decided that a marriage celebrated in the presence of the *British Consul* at Antwerp (there being no ambassadors or factory there) was invalid, though the ceremony was performed in the English church at Antwerp, inasmuch as the statute does not mention a consul. The marriage was not performed in accordance with the law of Holland, and consequently was altogether void (f). And no marriage is voidable, by the ecclesiastical law, after the death of either of the parties (f).

*Divorces.*—Marriages may be dissolved either by death or divorce. Divorce is either *à vinculo matrimonii*, for some of the canonical causes before-mentioned, and those existing before the marriage, as is always the case in consanguinity; not supervenient or arising afterwards, as may be the case in affinity or corporal imbecility, or merely *à mensa et thoro*, for some supervenient cause, which makes it improper or impossible for the parties to live together, as in the case of intolerable ill-temper or adultery in either of the parties. However, though a divorce *à vinculo* cannot be obtained in the regular

course of law on the ground of adultery, yet it is frequently granted on that ground by a private act of Parliament (*g*). In case the divorce is *à vinculo matrimonii*, the marriage is declared null, as having been absolutely unlawful *ab initio* ; and the parties are therefore separated *pro salute animarum* ; but in divorce *à mensâ et thoro*, the marriage bond is suspended, but not destroyed (*h*).

*Mutual rights, &c., of husband and wife.*]—The law considers husband and wife as one person ; for the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband : under whose wing, protection, and cover, she performs everything, and therefore is called a *feme covert*. A man therefore cannot grant anything to his wife, or enter into covenant with her, for the grant would be to suppose her separate existence ; and to covenant with her would only be to covenant with himself. Though the husband and wife cannot at common law contract with each other, or grant to each other directly, yet even direct gifts between husband and wife are often considered as effectual in the courts of equity (*i*). And these courts will also take cognizance of any trust created in favour of the wife, whether by the husband or a stranger ; and, in administering that jurisdiction, will take views of the rights of a *feme covert* materially different in some respects from those of the common law. It is also to be observed, that in respect of any trust property settled to the separate use of the wife, the courts of equity allow her to sue her husband, or be sued by him ; though it is a rule of the common law, founded on their identity of person, that they are incapable of standing towards each other in the relation of

plaintiff and defendant, in the courts where the law is administered (*j.*) And the rule of the ecclesiastical courts, in matters falling within their jurisdiction, is the same in this respect with the rule in equity; that is, they permit husband and wife to be opposed to each other as parties in a suit (*k.*).

A woman may be attorney for her husband, for that implies rather a representation of, than a separation from, her husband. A husband, also, may bequeath anything to his wife by will, for that cannot take effect till the *coverture* is determined by his death. A husband is bound to provide his wife with necessaries, and if she contracts debts for them, he is obliged to pay them; but for anything besides necessaries he is not chargeable. Also, if a wife elopes and lives with another man, the husband is not chargeable even for necessaries; at least if the person who furnishes them is sufficiently apprised of the elopement (*l.*). If the wife be indebted before marriage, the husband is bound to pay the debt, for he has adopted her and her circumstances together. If the wife be injured in her person or her property, she can bring no action without her husband's concurrence, and in his name as well as her own; neither can she be sued without making her husband a defendant. But if the husband has been transported, or if he be banished or attainted, during these disabilities, the wife may contract debts, and is liable to be sued for them alone (*m.*). In criminal prosecutions, also, the wife may be indicted and punished separately, for the union is only a civil union. But in trials of any sort, they are not allowed to be evidence for or against each other. A married woman however may, notwithstanding her *coverture*, make a conveyance of her property, but in this case the husband must concur (in general), and she

must be solely and secretly examined, to learn if the act be voluntary (*n*). She cannot make a will unless under special circumstances (*o*). A wife may have security of the peace against her husband, as in return a husband against his wife.

## CHAP. XV.

## PARENT AND CHILD.

[See 1 Black. Com. ch. 16; 2 Steph. Com. Bk. III, ch. 8.]

*Legitimate children.*—Children are of two sorts : legitimate and spurious. A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards. *Pater est quem nuptiæ demonstrant*, but the nuptials must be precedent to the birth. Parents are, by a principle of natural law, obliged to maintain their legitimate children; and it is provided by 43 Eliz. c. 2, that the father and mother, grandfather and grandmother, of poor impotent persons, unable through infancy, disease, or accident, to maintain themselves, shall maintain them at their own charge, if of sufficient ability, according as the quarter sessions shall direct : and by 5 Geo. 1, c. 8, if a parent runs away and leaves his children, the churchwardens and overseers of the parish shall seize his rents, goods, and chattels, and dispose of them towards their relief. By the 4 & 5 Will. 4, c. 76, ss. 56, 57, all relief given under the poor laws to any child or children under the age of sixteen (not being blind, or deaf and dumb), shall be considered as given to the father, or (if he is dead) to the widow; and every person is made liable to maintain his wife's children (whether

legitimate or illegitimate) before marriage, as part of his family, and shall be chargeable with all relief granted to them under the poor laws, until they attain the age of sixteen, or until the death of the mother (a).

It is also the duty of parents to protect their legitimate children, and therefore a parent is permitted to support his children in law-suits, without being guilty of the crime of maintaining quarrels; and he may also justify an assault and battery in defence of the persons of his children. The power of parents over their children is given to enable them to perform their duty, and therefore a parent may lawfully correct his child, being under age, in a reasonable manner; and by the Marriage Acts, 4 Geo. 4, c. 76, and 6 & 7 Will. 4. c. 85, the dissent of the father to the marriage of his child will render the contract invalid. A father has no other power over his son's estate than as his trustee or guardian; for though he may receive the profits during the child's minority, yet he must account for them when he comes of age. The legal power of a father (for a mother, as such, is with one or two exceptions, entitled to no power) over the person of his children ceases at the age of twenty-one, yet till that age arrives, his power continues, even after his death; for he may by his will appoint a guardian to his children (b). He may also, during life, appoint a tutor or schoolmaster, who is then *in loco parentis*, and has such a power of restraint and correction as may be necessary to answer the purposes for which he is employed. The duties of children to their parents also arise from a principle of natural justice and retribution, and a child is justifiable in defending the person or maintaining the cause of his parent; and is compellable, if of sufficient ability, to provide for his support.

*Illegitimate children.*] — Spurious children are those whom the law calls bastards. A bastard is one that is not only begotten but born out of lawful matrimony; or, if the father and mother be married, is born so long after the death of the husband, that by the usual course of gestation he could not be begotten by him. So also, if the husband be out of the kingdom, or *extra quatuor maria*, for above nine months, so that no access to his wife can be presumed, her issue during that period shall be *bastard*; but during coverture, access shall be presumed, unless the contrary be shown (c). In a divorce also *à mensâ et thoro*, if the wife breeds children they are bastard, unless access be proved; but in a voluntary separation by agreement, the law will suppose access, unless the negative be shown. So also, if there is an apparent impossibility of procreation on the part of the husband, the issue of the wife shall be bastard. Likewise, in cases of divorce *à vinculo matrimonii*, all the issue born during the coverture are bastards; for such divorce is always upon some cause that rendered the marriage unlawful and null from the beginning (d). The duty of parents to their bastard children is principally that of maintenance; and therefore it is provided that the woman may either before, or within twelve months after birth, apply for a summons, returnable before a metropolitan magistrate or petty sessions, against the putative father. On the hearing, the evidence of the woman being corroborated in some material particular, an order may be made on the putative father for the payment of a weekly sum of money, and sundry incidental expenses. The putative father may appeal to the next general quarter sessions of the peace, on giving notice thereof within twenty-four hours after the order is made, and entering into a recognisance within seven days (e).

A bastard has no rights but such as he can acquire, for he can inherit nothing, being looked upon as the son of nobody, yet he may gain a name by reputation, though he has none by inheritance (*f*). A bastard cannot be heir to any one, neither can he have heirs but of his own body; for being *nullius filius*, he is of kin to nobody, and has no ancestor from whom any inheritable blood can be derived; and can only be made legitimate by act of Parliament (*g*). To authorise the marriage of a bastard under twenty-one, the consent of his father or mother is not required, and is of no avail; but a guardian may be appointed by the Court of Chancery for the purpose, or a license may be granted on oath made that there is no person authorised to give consent. And it may be added, that though in general a father may appoint a guardian for his infant child, in the event of his decease, he has no such privilege if the child be illegitimate (*h*).



## CHAP. XVI.

## GUARDIAN AND WARD.

[See 1 Black. Com. ch. 17; 2 Steph. Com. B. III. ch. 4.]

Guardians are of several kinds: 1. Guardians by nature—viz., the father, and, in some cases the mother, of the child; for if an estate be left to an infant, the father is by common law the guardian, and must account to the child for the profits. By the construction of 4 & 5 Phil. and Mary, c. 8, the father may assign a guardian to any woman-child under the age of sixteen; and if none be so assigned, the mother shall be guardian (*a*). 2. Guardians for nurture, which are of course the father or mother, till the infant attain the age of fourteen years; and, indeed, substantially, till he attains the age of twenty-one (*b*). 3. Guardians in socage, or by the common law. These take place only when the minor is entitled to some estates in lands, and then this species of guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descend; for the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him. These guardians in socage, like those for

nurture, continue only till the minor is fourteen years of age, except in the case of gavelkind lands; for then, in both cases, he is presumed to have discretion so far as to choose his own guardian (c).

4. Testamentary guardians are created by 12 Car. 2, c. 24, which enacts that any father under age, or of full age, may, by deed or will, dispose of the custody of his child, either born or unborn, to any person except a Popish recusant, either in possession or reversion, till such child attain the age of twenty-one years (d). 5. Guardianship by appointment of the Lord Chancellor. The Court of Chancery, if application be made on the behalf of an infant (whether legitimate or illegitimate), having, or in some cases not having property, who has no other guardian, will appoint him one for protection both of his person and estate; and has a right to exercise this jurisdiction, if sufficient reason should appear, notwithstanding the existence of a guardian in socage; and though where there is a guardian under the statute, able and willing to act, the court is not entitled to remove him, it will regulate his conduct, or appoint some other person to superintend the infant and his estate, where any case arises to call for such interposition (e). Under the 3 & 4 Vict. c. 90, the Court of Chancery is empowered to take away infants convicted for felony out of the control of their parents or other guardians (if it shall appear expedient), and to assign the custody of them to such other persons as may be willing to be entrusted with the charge (f). 6. There is a guardianship *ad litem*, that is, to sue or defend for the infant (g).

There are also special guardians by custom of London and other places; but they are particular exceptions, and do not fall under the general law. The power and reciprocal duty of guardian and

ward are the same, *pro tempore*, as that of a father and child; but the guardian, when the ward comes of age, is bound to account, and shall answer for all losses by his wilful default or negligence (*h*). The practice of many guardians, therefore, is to apply, account to, and act under the direction of the Court of Chancery; for the Chancellor, by right derived from the Crown, is the general and supreme guardian of all infants, as well as idiots and lunatics.

## CHAP. XVII.

## PROPERTY IN GENERAL.

[See 2 Black. Com. chaps. 2, 5, and 6; 1 Steph. Com. chaps. 1 and 2.]

Having in the preceding chapters considered persons, we have now to treat of property.

Property is distributed into two kinds, real and personal. Real property is such as is permanent, fixed, and immoveable, and the rights and profits annexed to or issuing out of these, as lands, tenements, and hereditaments, and incorporeal rights thereout. Personal property consists in goods, money, and all other moveables, which may attend the owner's person wherever he thinks proper to go.

*Land.*]—Land is a word of a very extensive signification, and comprehends all things of a permanent, substantial nature, not only gardens, arable grounds, meadows, pastures, moors, waters, rivers, marshes, furze, heath, but also messuages—that is, houses, tofts, or places where houses once stood, mills, castles, &c., in short, any ground, soil, or earth whatsoever, with all buildings thereon. Land also is of indefinite extent, upwards as well as downwards, *cujus est solum ejus est usque ad œlum* (a); and

therefore no man may erect any building, or the like, to overhang another's land; and whatever is in a direct line between the surface of any land and the centre of the earth belongs to the owner of the surface; so that the word land includes not only the face of the earth, but everything under and over it.

*Tenements.*]—Tenement is a word of still greater extent; and though, in its vulgar acceptation, it is only applied to houses and other buildings, yet, in its original, legal, and proper sense, it signifies everything that may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial, ideal kind. Thus, *liberum tenementum*, frank-tenement or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like: and as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, and other property of the like unsubstantial kind, are all of them, legally speaking, tenements (*b*).

*Hereditaments.*]—Hereditaments is the largest and most comprehensive word of them all, and signifies whatever may be *inherited*, or may come to an *heir*; be it corporeal or incorporeal, real, personal, or mixed; and although it be not holden or do not lie in tenure. Thus, an heir-loom, or implement of furniture, which by custom descends to the heir together with a house, is neither land nor tenement, but a mere moveable, yet, being inheritable, is comprised under the general word hereditament; and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament. Hereditaments are either corporeal or incorporeal. Corporeal are such as affect the senses; such as

may be seen and handled by the body; all which may be comprehended under the general denomination of land only. Incorporeal is a right issuing out of a thing corporate (whether real or personal), or concerning, or annexed to, or exerciseable within the same, and is not the object of sensation; can neither be seen nor handled; a creation of the mind, existing only in contemplation; as a rent issuing out of lands or houses, or an office, annuity, tithes, and the like (c).

*Tenures.*—All the land in England is supposed to be holden of the Sovereign, either mediately or immediately—a doctrine originating from the feudal law. The doctrines of the feudal law are of importance, but we can only observe that formerly there were three kinds of tenure—namely, knight-service, free socage, and copyhold. Knight-service drew after it the feudal incidents of aids, reliefs, fines for alienation, primer seisin, wardship, &c. There were other species of knight-service, as grand serjeanty, escuage, and cornage. However, by the 12 Car. 2, c. 24, knight-service was destroyed, and all tenures were turned into free and common socage, saving only the tenures in frankalmoign (d), copyholds, and the honorary services of grand serjeanty. We have, therefore, in effect, only the tenures of socage and copyhold to deal with. All the tenures which are not copyhold must, therefore (with the exception of grand serjeanty), be socage. In fact, socage (or free socage, as it was called) is now denominated freehold. There are some varieties of socage or freehold tenures, as petit serjeanty, tenure in burgage, and gavelkind. The first is of no practical importance (d). Tenure in burgage is important so far as regards the custom of borough-English, respecting which, as also the tenure of gavelkind, we

have had and shall have occasion to speak. The third tenure, namely, copyhold, will also be noticed hereafter (e).

Having thus spoken in a general manner of real property, we shall in the following chapters consider the estates which a man may have therein, and the title or the means of acquiring and losing the same. Afterwards we shall notice copyholds, and then proceed to the consideration of the second division of property, namely personalty.

Estates in lands, tenements, and hereditaments, are such interest as the tenant hath therein; to ascertain which may be considered—1, The quantity of interest; 2, The time of enjoyment; 3, The number and connexion of the tenants.

Estates, with respect to their quantity of interest or duration, are either freehold or less than freehold. Freeholds, again, are either of inheritance or not of inheritance. These statements enable us to adopt the arrangement of the three following chapters, namely—1, Estates of Inheritance; 2, Estates not of Inheritance; 3, Estates less than Freehold.

It is important that the student should bear in mind that at the common law, and prior to certain alterations in our system (f), an estate of freehold in hereditaments corporeal could, in general, be created or transferred only by the ceremony called *livery of seisin*, attended with proper words of donation; which ceremony consisted, as the words import, of a solemn delivery of possession, and was, in fact, the ancient feudal investiture.

## CHAP. XVIII.

## ESTATES OF INHERITANCE.

[See 2 Black. Com. ch. 7; 1 Steph. Com. ch. 8.]

Estates of inheritance (otherwise called a fee) are either estates in fee simple absolute, qualified, conditional, or tail.

*Fee simple.*—An estate in fee simple, *feodum simplex*, is where one has lands or tenements to hold to him and his heirs for ever. This is property in its highest degree, for a man cannot have a greater estate; and the owner is said to be seised thereof absolutely *in dominico suo*, in his own *demesne*. To have a fee is to have an inheritance; and fee simple implies that it is to the heirs general, and not limited to any special line of descent. But all lands were originally holden of some superior lord; and even at this day, in contemplation of law, the absolute or *allodial* property in all lands is supposed to reside in the King; and therefore, although an estate in fee simple is said to be a man's *demesne*, *dominium*, or property, since it belongs to him and his heirs for ever, yet it is of a qualified or feudal nature, his *demesne as of fee*; that is, not purely and simply



his own, since it is held of a superior lord, in whom the ultimate property resides. All other estates and interests are derived out of a fee simple, and therefore there must be a fee simple at last in somebody. It has, indeed, been said by some writers that the inheritance may be *in abeyance*, that is, in consideration and custody of law only. They say, that if one grants a lease for twenty-one years, or for one or two lives, the fee simple remains vested in him and his heirs, and after the determination of these years or lives the land reverts to the grantor or his heirs, who shall hold it again in fee simple: but if a grant be made to John for life, and afterwards to the heirs of Richard (a living person), the inheritance is neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death; for *nemo est hæres viventis* (a); it remains, therefore, in their judgment, in waiting or abeyance during the life of Richard. But this doctrine of abeyance has been shown by Mr. Fearne to be erroneous (b). The word "heirs" is necessary in a deed in order to make a fee; for if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life. But this rule does not extend to *devises by will*, to creations of nobility, to grants of land to sole corporations and their successors, or to the case of the King; for by a devise to a man without any limitation, or to one and his assigns for ever, or to one in fee simple, the devisor hath an estate of inheritance (c). In the creation of nobility the word "heirs" is implied; and in the case of corporations and the King the word "successors" supplies the place of "heirs."

A fee or estate of inheritance, is divided into simple or absolute, which we have already described, and into conditional and qualified, or base (d).

*Qualified or base fee.*]—A base or qualified fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end; as a grant to A. and his heirs, tenants of the manor of Dale; the grant is determined when the heirs of A. cease to be tenants of that manor. It is a fee, because by possibility it may endure for ever; but base or qualified, because it may end sooner. The term "base fee" is also used by some writers in a different manner, and in some acts of Parliament, as the 3 & 4 Will. 4, c. 74, for the abolition of fines, &c.

*Conditional fee.*]—A conditional fee, at common law, was a fee restrained to some particular heirs, in exclusion of others: as, "to the heirs of a man's body," or, "the heirs male of his body." It was a fee, because it might possibly endure for ever; and conditional, because the condition expressed or implied at its creation was, that, on failure of such particular heirs, it should revert to the donor. Under the ancient rule of conditional fees remain annuities and copyholds (where there is no custom to entail), and such like inheritances as fall not within the statute de donis. As soon as the grantee had any issue born, his estate was supposed to become absolute, by performance of the condition, at least so far as to enable him to alien it, to forfeit it for high-treason, and to charge it with certain incumbrances. But upon the construction of 13 Edw. 1. c. 1, commonly called the statute de donis, the judges determined that the donor had no longer a conditional fee-simple, which became absolute and at his own disposal the instant any issue was born; but they divided the estate into two parts, vesting in the donor the ultimate fee-simple of the land, expectant on the failure of

issue; which expectant estate is what we now call a reversion; and leaving in the donee a new kind of particular estate, which they denominate a fee-tail (*e*).

*Estates tail.*—Estates tail are either general or special. Tail general is where lands and tenements are given to one and *the heirs of his body begotten*: which is called tail general, because, how often soever such donee in tail be married, his issue in general, by all and every such marriage, is, in successive order, capable of inheriting the estate tail, by the form of the gift. Tenant in tail special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways; as where lands and tenements are given to a man and *the heirs of his body on Mary his now wife to be begotten*: here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife; and therefore it is called special tail. The words of inheritance, "to him and *his heirs*," give an estate in fee; but they being heirs "to be by him begotten," make it a fee tail; and the person being limited on whom such heirs shall be begotten, viz., "Mary his present wife," makes it a fee tail special. Estates in general and special tail are farther diversified by the distinction of sexes in such intails; for both of them may be either in tail male, or in tail female: as if lands be given to a man and the heirs male of his body begotten, that is an estate in tail-male general; but if to a man and the heirs female of his body on his present wife begotten, this is an estate in tail female special. And in case of an intail male, the heirs female shall never inherit, nor any derived from them; nor, *et converse*, the

heirs male in case of a gift in tail female. As the word "heirs," or some other word of inheritance, is necessary to create a fee, so the word "body," or some other word of procreation, is necessary to make an estate tail, and ascertain to what heirs the fee is limited; and if either the words of inheritance or procreation be omitted, it will not be an estate tail; but in last wills, estates tail may be devised by irregular modes of expression, such as to a man and his seed, or to a man and his heirs male, or to a man and his issue (*f*).

*Frank marriage.*—Frank marriage is an obsolete species of estates tail, yet still capable of subsisting in law; which is, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frankmarriage: and in this case the word frankmarriage gives the donees an estate in tail special.

*Incidents of estates tail.*—The incidents to a tenancy in tail, under the statute de donis, are chiefly,—1. That the tenant may commit waste. 2. That the husband of a female tenant in tail may be tenant by the curtesy. 3. That it might formerly have been barred by fine or recovery and may now be by an assurance executed under the 3 & 4 Will. 4, c. 74. 4. That formerly it was not liable to debts, but the 1 & 2 Vict., c. 110, makes a judgment binding on tenant in tail and his issue (*g*). 5. Tenants in tail may also make certain leases under the provisions of the 32 Hen. 8, c. 28.

And these four species of estates are alone estates of inheritance; those which follow being freeholds, but not of inheritance.

## CHAP. XIX.

## ESTATES NOT OF INHERITANCE.

[See 2 Black. Com. ch. 8; 1 Steph. Com. ch. 4.]

Freehold estates not of inheritance are life estates, of which some are created by the act of the parties, whilst others arise by construction of law.

*Estates for life.*—Estates for life, created by the act of the parties, are, where a lease is made of lands or tenements to a man to hold for the term of his own life, or for that of any other person, or for more lives than one; and where the estate is for the life of another, the tenant is called *tenant pur autre vie*. These estates may be created not only by the express words before-mentioned, but also by a general grant, without defining or limiting any specific estate; as if one grants to A. the manor of Dale, this makes him tenant for life. Though in a will this would now carry a fee. Such estates will, generally speaking, endure as long as the life for which they are granted; but there are some estates for life which may determine upon future

contingencies, before the life for which they are granted expires; as if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these cases, whenever the contingency happens, the estate is determined and gone.—The incidents to an estate for life are—1. That the tenant, unless restrained by covenant, may, of common right, take upon the land demised to him reasonable *estovers* or *botes*. 2. That his representatives shall have the *emblements* or profits of the crop if he dies before harvest; for as the determination of his estate is contingent and uncertain, he shall not be prejudiced thereby (*a*). 3. That the under-tenants, or lessees of tenant for life, shall have the same indulgences as their lessors; and in those cases, where tenant for life shall not have emblements, as where he forfeits for waste, or does anything to determine the estate by his own act, the deprivation shall not reach his lessee. By 11 Geo. 2, c. 19, s. 15, the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a rateable proportion of the rent from the last day of payment to the death of such lessor. This act has been amended and extended by the 4 & 5 Will. 4, c. 22 (*b*).

*Estates in tail, after possibility of issue extinct.*—This happens where one is tenant in special tail, and the person from whose body the issue was to spring dies without issue; or, leaving issue, that issue becomes extinct: as, where one has an estate to him and his heirs, on the body of his present wife to be begotten, and the wife dies without issue, the man has an estate tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis as absolutely necessary to give an adequate

idea of his estate. This estate must be created by the act of God, that is, by the death of the person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it. This estate partakes partly of an estate tail and partly of an estate for life. The tenant is not punishable for waste, and had other privileges arising from abolished doctrines of the law (*c*). In general, however, the law considers this estate as equivalent to an estate for life only; and as such, will permit a tenant in tail, after possibility of issue extinct, to exchange his estate with a tenant for life (*d*).

*Curtesy.*—Tenant by the curtesy of England is where a man marries a woman seised of lands and tenements in fee simple or fee tail, and has by her issue, born alive, which was capable of inheriting her estate, as heir to her (*e*), and survives her, in which case he shall, on her death, hold the lands for his life. In gavelkind lands (*p*. 3) the husband is entitled to no more than a moiety, and that only while he remains unmarried, but then he is entitled, though no issue were born (*f*). There are four requisites to make a tenant by the curtesy: marriage, seisin of the wife, issue, and death of the wife. 1. The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin, or possession, of the lands. 3. The issue must be born alive, and during the life of the mother, so that, if the mother dies in labour, and the Cæsarian operation is performed, the husband loses the estate, because at the instant of the mother's death he had no issue born; and the land descended to the child in the mother's womb, and being so vested, shall not be taken from him; if the issue was born during coverture, and capable of inheriting the mother's estate, it is immaterial at

what time it was born, for in all possible circumstances, the husband shall be tenant by the curtesy.

This estate is of a superior degree to a mere tenancy for life, and the husband may, even in the life-time of the wife, after the birth of issue, do many acts to charge the lands, although he is only tenant by the curtesy initiate till the death of the wife, when his estate is consummate.

*Dower.*]—Tenant in dower is where the husband dies seised of an estate in fee, or fee tail, to which the issue (if any) by his wife might have inherited (*g*), and the wife survives, and takes as her dower the third part of all the lands and tenements whereof he was seised during the coverture, for the term of her natural life. And this third part is to be valued according to the value of the estate at the time of the assignment of the dower, whether the premises be improved or impaired since they came into the hands of the heir. In gavelkind lands (*p. 3*) the wife is entitled to a moiety, but she must remain chaste and unmarried (*h*), and by the particular custom of some places she is entitled to the whole, or a moiety, or even a quarter only (*i*).

There were formerly several kinds of dower, but dower by the common law is the only species of dower now existing, though, as we have seen, there is also dower by custom, which differs in some respects from that at the common law. Two points are material to consider:—1. Who may be endowed. 2. Of what. As to the first, then, she must be the actual wife of the deceased at the time of his death. A divorce *à vinculo matrimonii* destroys the dower, but not one *à mensa et thoro*; but by the statute of Westminster the 2nd (13 Edw. 1, c. 34) if a woman elopes from her husband, and lives with an adul-



terer, she loses her dower, unless her husband is voluntarily reconciled to her (*j*). The widows of traitors (except in case of certain modern treasons relating to the coin), but not of felons, are barred of their dower (*k*). An alien, married to a natural born subject, or to a person naturalised, will now be entitled to dower (*l*). As to the second, of what a wife may be endowed: In general the widow may be endowed of all lands and tenements of which her husband was seised or entitled in fee simple, or fee tail, at any time during coverture, and of which any of her issue might by possibility have been heir; and a seisin in law of the husband will be as effectual as a seisin in deed to entitle the wife to her dower. Indeed, seisin itself is now not requisite under the 3 & 4 Will. 4, c. 105, commonly called the Dower Act.

The seisin of the husband for a transitory moment only, when the same act which gives him the estate conveys it out of him again (as where, by a fine prior to its abolition, land was granted to a man, and granted back again by the same fine), will not entitle to dower, for the land was merely *in transitu*, and never rested in him; but if it had rested in him for a single moment, she would be endowed of it (*m*). Dower was often defeated, and still may be so, by the husband taking a conveyance to uses to bar dower, but, as we shall see presently, the same result may be effected more simply as to wives married after the 1st of January, 1834 (*n*).

In general, a wife might have been endowed or all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, although the husband had alone aliened the lands during the coverture, for he was considered to have aliened them subject to his wife's dower. However, in the case of copy-

holds (in which instance the dower obtained the name of *freebench*) the wife was only entitled out of such copyhold lands as her husband died seised of, so that his alienation deprived her of her freebench (o). And as to freeholds, now an alienation of the lands will deprive her of her dower. This is by the 3 & 4 Will. 4, c. 105, which provides that all dispositions which he may make of his land (whether absolute or partial, and whether by conveyance in his lifetime or by will), and all debts and incumbrances to which it may be subject, shall be deemed to be valid and effectual, as against his widow's right to dower. The same act also gives still greater facilities than before existed for the barring of dower, which it allows to be effected by a simple declaration for that purpose introduced into the deed, by which the land is conveyed to the husband, or into any deed executed by him, or into his last will and testament. And it is farther enacted, that where the husband devises for his wife's benefit any part of his land that had been subject to her dower, she shall be thereby excluded from her claim of dower, unless a contrary intention is declared by the will, though it is otherwise as to a bequest of personalty, or of land on which her claim would not attach. However, none of the provisions of the act apply to the case of women married on or before 1st January, 1834; and as to these the former law consequently remains in its full force, which must be borne in mind wherever this act is mentioned. It may be stated that the wife may not be endowed of a castle built for the public defence of the realm, but she may of the principal mansion, unless it be a castle built for defence of the realm, or *caput comitatûs sive baronis*. Moreover, a woman shall now, by the 3 & 4 Will. 4, c. 105, s. 2, have dower of an estate wherein her husband had not the legal, but

only an equitable interest; and by sect. 3 of the same statute it is enacted that seisin shall not be necessary to give a title to dower.

By Magna Charta, c. 7, the widow may remain in the chief house of her husband for forty days after his death, within which time her dower shall be assigned to her. These forty days are called the widow's quarantine, and the lands to be held in dower must be assigned by the heir of the husband, or his guardian, to entitle the lord to demand his services of the heir for the lands so holden. If her dower is not assigned fairly, and within the forty days, she has her remedy by writ of dower; and after judgment the sheriff, by a writ of execution, will be commanded to assign it. If the thing of which she is endowed is divisible, her dower must be set out by metes and bounds; if indivisible, she must be endowed specially, as of the third presentation to a church; the third part of the profits of an office, of stallage, or a fair; the third part of a dove-house or a fishery; and the surest way of taking dower of tithes is by every third sheaf, &c.

A woman loses her dower if she detains the title-deeds or evidences of the estate from the heir, until she restores them; and by the Statute of Gloucester, if she aliens the land assigned her, she forfeits it *ipso facto*, and the heir may recover it (*p*).

*Jointure.*]—A jointure is a competent livelihood of freehold lands or tenements for the wife, to take effect presently, in possession or profit, after the natural death of the husband, for the life of the wife at least, if she herself is not the cause of the determination or forfeiture of it; as where the estate is settled *durante viduitate*, and she marries. This description is framed from the purview of the

statute 27 Hen. 8, c. 10, commonly called the Statute of Uses, which enacts, "that when an estate is made in possession or use to husband and wife and his heirs, or to the heirs of their two bodies, or of one of their bodies, or to them for their lives, or for the wife's life (which is the ordinary case), for her jointure, she shall not have dower." To effect, however, a perfect jointure within this statute, so far as to bar a wife of her claim of dower, six requisites must be punctually observed:—1. The jointure must be made to take effect for her life, in possession or profit, immediately on the death of her husband. 2ndly. It must be for the term of her own life, or of some greater estate, and not for years, or *pur autre vie*. 3rdly. It must be made to herself, and no other in trust for her. 4thly. It must be made in satisfaction of her whole dower, and not of a part of it. 5thly. It must be either expressed or be averred to be in satisfaction of dower (*q*). 6thly. It must be made either before or after marriage; but if it be made before marriage, the wife cannot waive it (even if she were an infant, and not a party to the deed of jointure) and claim her dower at the common law, as she may do when it is made after marriage. This statute does not extend to copyholds, because dowers of copyholds are warranted by special custom; but if the wife hath a compensation for it, it shall in equity be deemed a satisfaction for her *freebench* in copyhold lands, which is in the nature of a customary dower. There are some advantages attending tenants in dower, that do not extend to jointresses; and so, *vice versa*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower, by the old common law, is subject to no tolls or taxes; nor can the King distrain on her estate for his debt, if it be contracted during

the coverture. But on the other hand, a widow may enter without any formal process on her jointure land; whereas a very tedious method of proceeding is necessary to compel a legal assignment of dower. Dower is forfeited by the treason of the husband, or by the wife's adultery; but lands settled in jointure remain unimpeached to the widow. The above relates to a legal jointure, but the wife may also be barred of her dower by a mere *equitable* jointure; if she be an infant the provision must be as certain as her dower (r).

## CHAP. XX.

## ESTATES LESS THAN FREEHOLD.

[See 1 Black. Com. ch. 9; 1 Steph. Com. ch. 5; Litt. Ten. p. 32—44.]

The estates of which we have spoken in the preceding two chapters were estates of freehold at the least; now we have to speak of estates less than freehold, which are for years, at will, and by sufferance.

*Estate for years.*—An estate for years is where a man has an interest and possession of lands or tenements for some determined period; as where a man lets them to another for the term of a certain number of years, agreed upon between the lessor and lessee, and the lessee enters thereon. A tenant for half a year, or a quarter of a year, is considered as a tenant for years; for a year is the shortest time which the law in this case will take notice of (*a*). Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years; and therefore this estate is frequently called a term, because its duration or continuance is bounded, limited, and determined; for every such estate must have a certain beginning

and certain end. But *id certum est quod certum reddi potest*: therefore if a man make a lease to another for so many years as J. S. shall name, it is a good lease for years; for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making or delivery of the lease. A lease for so many years as J. S. shall live, is void from the beginning. But a lease for twenty or more years, if J. S. shall so long live, or if he shall so long continue parson, is good.

*Chattel interest.—Interesse termini.*—It is to be observed that an estate for life, even if it be *pur autre vie*, is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate. Hence it follows that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As, if I grant lands to A to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life is void. For no estate of freehold could, at the common law, commence *in futuro*; because it could not be created at common law without livery of seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter. And because no livery of seisin is necessary to a lease for years, such lessee is not said to be seised, or to have true legal seisin of the lands (*b*). Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his interest in the term, or *interesse termini*: but when he has actually so entered, and thereby accepted the grant, the estate

is then, and not before, vested in him (though he may grant it over before entry), and he is possessed, not properly of the land, but of the term of years; the possession or seisin of the land remaining still in him who hath the freehold. Thus the word term does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire during the continuance of the *time*; as by surrender, forfeiture, and the like.

Tenant for term of years hath incident to, and inseparable from his estate, unless by special agreement, the same estovers which the tenant for life is entitled to.

*Emblements.*]—With regard to emblements, or profits of land sowed by tenant for years, there is this difference between him and tenant for life:—that where the term of tenant for years depends upon a certainty, as if he holds from Midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before Midsummer, the end of his term, the landlord shall have it; for the tenant knew the expiration of his term. But where the lease for years depends upon an uncertainty, the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant or his executors shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. Not so, however, if it determined by the act of the party himself; as by doing an act of forfeiture (c).

*Estate at will.*]—An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the



tenant, by force of this letting, obtains possession (*d*). Every estate at will must be at the will of both parties, though one party be only named; so that either of them may determine his will, and quit his connection with the other at his own pleasure. But if tenant at will sow the land, and the landlord, before the corn is ripe, or when it is ripe, put him out, the tenant, notwithstanding, shall have the corn, and shall have free egress and regress to cut and carry it away. But if the tenant himself determines the will, the landlord shall have the profits of the land (*e*). If a tenant at will commits voluntary waste, it amounts to a determination of the will; so also, the exertion of any act of ownership by the landlord, as by entering on the premises, cutting down timber, or making a lease for years to commence immediately, and by a declaration that the lessee shall no longer hold, which must either be made upon the land, or notice must be given to the lessee. If rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year; and indeed, tenancies at will are now, in most cases, and where such construction is supportable, considered as estates from year to year, in which the law will not suffer either party to determine the tenancy, even at the end of the year, without reasonable notice to the other, which is half-a-year's notice, ending with the current year of the tenancy (*f*).

*Tenancy at sufferance.*]—An estate at sufferance is where one enters by a lawful lease, and keeps his possession after his lease is expired, and so holds over by wrong (*g*). But no man can be tenant at sufferance against the sovereign. By 4 Geo. 2, c. 28, all persons holding over, after

demand and notice in writing to quit possession, shall pay double the yearly value for the time they shall hold over; and by 11 Geo. 2, c. 19, they shall pay double rent if they do not deliver up possession at the expiration of their own notice to quit. By 1 & 2 Vict. c. 74, a summary remedy by application to justices was given, but this is practically superseded by the 9 & 10 Vict. c. 95, s. 122, which enables the landlord, where the term has expired or been determined by notice to quit, if the rent does not exceed £50, and no fine has been paid, to enter a plaint in the county court, and the judge of the county court may order possession of the premises to be given to the landlord (*h*).

## CHAP. XXI.

## INCORPOREAL HEREDITAMENTS.

[See 2 Black. Com. ch. 3; 2 Steph. Com. Bk. II. pt. 1, ch. 22.]

Having considered real property of a corporeal nature, we shall now proceed to enumerate those hereditaments which are of an incorporeal kind. This species of property consists principally of the following subjects:—

*Advowsons.*]—An advowson is the right of presenting a clerk to the bishop as often as a church becomes vacant, and is synonymous with patronage; and therefore he who has the right of advowson is called the patron of the church. There may be an advowson of the moiety of the church, and of a moiety of the advowson. The first is, where there are two several patrons, and two several incumbents of one church, the one of the one moiety, and the other of the other moiety of the church. The second is where two must join in the presentation, and where there is but one incumbent, as where there are two coparceners; for although they agree to present by turns, yet each of them hath but the moiety of the Church (*a*). Advowsons,

also, are divided into advowsons appendant and advowsons in gross. The first is the right of presentation dependent upon a manor, lands, or tenements, and does not pass in a grant of the manor as incident thereto. The second is a right subsisting by itself belonging to a person, and not to a manor, lands, &c. So that when an advowson appendant is severed by legal conveyance from the corporeal inheritance to which it was appendant, it becomes an advowson in gross, or at large, and can never be appendant any more. Advowsons are also either presentative, collative, or donative. An advowson presentative is where the patron hath a right of presentation to the bishop or ordinary, and to demand of him to institute his clerk, if he finds him canonically qualified. An advowson collative is where the bishop and patron are one and the same person; in which case the bishop cannot present to himself, but he does by the one act of collation, or conferring the benefice, the whole act that is done in common cases, both by presentation and institution. An advowson donative is where the King or other patron does, by a single donation in writing, put the clerk into possession, without presentation, institution, or induction; but if the patron once waives this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the advowson is for ever after presentative (*b*).

*Tithes.*] — Tithes are a species of incorporeal hereditament consisting of the tenth part of the increase yearly arising from the profits of land, stock upon land, and the industry of the parishioners, payable for the maintenance of a parish priest by every one that hath things tithable, except he can show a special exemption. They are an ecclesias-

tical inheritance, collateral to the estate of the land, not issuing out of it, but distinct from it, and therefore not extinguished by unity of possession only. Tithes are of three kinds. 1, *Predial*, or those that immediately arise from the land, either by manurance or its own nature, as grain of all sorts, hay, wood, fruit, herbs, &c. : 2, *Mixed*, as of wool, milk, pigs, consisting of natural products, but nurtured and preserved, in part, by the care of man—and of these the tenth must be paid in gross ; 3, *Personal*, such as arise from the labour and industry of man, as occupations, trade, fisheries, &c., being a tenth part of the clear gains. Tithes, with regard to their value, are also divided into great and small. Great tithes are corn, hay, and wood. Small tithes are all other predial tithes, except corn, hay, and wood, as also those tithes which are personal and mixed. Some things may be great or small in regard to the place ; as hops in gardens are small tithes, but in fields they may be great tithes. All tithes are due of common right to the parson or rector of the parish where they arise ; but by endowment or prescription they may become due to the vicar ; and the parson of one parish may prescribe to have a portion of the tithes, separately and divided, in the parish of another. But no layman is at this day capable of tithes, or a portion of tithes, except under the statute for dissolving religious houses, or from a grant made by the parson, patron, or ordinary previous to the disabling statutes. Laymen, therefore, can only be exempted from the payment of tithes either by a real composition, or by custom, or prescription. A real composition is an agreement made between the owner of the lands and the parson or vicar, with the consent of the ordinary or patron, that such lands shall for the future be discharged from payment of tithes, by reason of some land or other real recom-

pence given to the parson in lieu and satisfaction thereof; but by 13 Eliz. c. 10, no real composition is, in general, good for any longer term than three lives, or twenty-one years. However, the 2 & 3 Will. 4, c. 110, s. 2, has validated all such compositions made or confirmed by a decree in equity prior to the act (c). A custom or prescription is, where time out of mind such persons or such lands have been either partially or totally discharged from the payment of tithes; and is called a custom or prescription either *de modo decimandi*, or *de non decimando*. A *modus decimandi*, or simply a *modus*, is where there is, by custom, a particular manner of tithing allowed, different from the general law of taking tithes in kind; as twopence an acre for the tithe of land, or a couple of fowls in lieu of tithe eggs. This *modus* is supposed to be the full value of the tithe at the time of the original composition. And if it does not now come up to the value, it is to be intended that the tithes are either improved, or else that money is become of less value than it was at the time of the *modus* agreed on, which occasions the present inequality. But if the *modus* is so large as to exceed the value of the tithes prior to the reign of Richard I. (see p. 7), it will be invalid, except now under the 2 & 3 Will. 4, c. 71, to be presently mentioned. To make a good prescription the *modus* must be:—1, For the benefit and advantage of the parson, not for the benefit of another only; 2, One tithe must not be in consideration of another, as tithe of cows for tithe of oxen, &c.; 3, It must be something different from the thing that is due; 4, It must be something as certain and durable as the tithe, though it may not be so valuable (d).

A prescription *de non decimando* is a claim to be entirely discharged of tithes, and to pay no compen-

sation in lieu of them. Thus the King by his prerogative, or at least by special prescription, is discharged from all tithes. So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesiæ*. But these personal privileges (not arising from or being annexed to the land) are personally confined to both the King and the clergy, for their tenant or lessee shall pay tithes. And, generally speaking, it was, prior to the 2 & 3 Will. 4, c. 100, an established rule that, in lay hands, *modus de non decimando non valet*. But spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands totally discharged of tithes by various ways, as:—1, By real composition; 2, By the Pope's bull of exemption; 3, By unity of possession, as when the rectory of a parish and lands in the same parish both belonged to a religious house, those lands were discharged of tithes by this unity of possession; 4, By prescription, having never been liable to tithes, by being always in spiritual hands; 5, By virtue of their order, as the Knight Templars, Cistercians, and others, whose lands were privileged by the Pope with a discharge of tithes, and upheld by the statute 31 Hen. 8, c. 13 (*e*).

By the 2 & 3 Will. 4, c. 100 (before alluded to), it is provided that as against any corporation aggregate or lay person not being a corporation sole, proof of usage for thirty years, or at all events for sixty years, unless an agreement in writing be shown, shall support a modus or discharge; in the case of a corporation sole, the proof of modus or discharge must be during the whole time of two incumbencies, and three years of a third, unless the same be less than sixty years (*f*).

But a far more important modern provision is that which has for its object to commute tithes into

a rent charge. The act for this purpose is the 6 & 7 Will. 4, c. 71, amended by various other acts. A board of commissioners, under the title of "The Tithe Commissioners of England and Wales," is thereby established, and it is provided that the commutation may be effected in two ways, namely, either by a voluntary parochial agreement, provided it be entered into by a certain proportion of the parties interested and confirmed by the commissioners, or by the compulsory award of the commissioners, for which latter purpose they are required to take, as the basis of the commutation (but with power to a certain extent, and in certain cases, to depart from it), the clear average value of the tithes of the parish, or of the composition payable for the same, where they have been compounded for, for the period of seven years, ending Christmas 1835. The value so voluntarily agreed upon, or awarded by the commissioners (as the case may be), is to be considered as the amount of the total rent charge to be paid in respect of the tithes in that parish, and to be afterwards apportioned among the lands of the parish, having regard to their average titheable produce and productive quality; and after the apportionment shall have been confirmed, such lands are to be absolutely discharged from the payment of all tithes, and instead thereof shall be subject to their portion of the rent charge, which shall be thenceforth payable to the former titheowner by two half-yearly payments. The amount of these payments fluctuates according to the average price of corn. The remedy is on the land, not the person of the party, and accordingly, when the rent charge is in arrear for twenty-one days, a distress may be levied on the land; but if it be in arrear for forty-days, and there be no sufficient distress, a writ may then be obtained from one of the judges



at Westminster, to assess the arrears; after which the owner of the rent charge may sue out a writ of execution for taking possession of the lands, and holding them till his debt (to the extent of two years' arrear) and costs be fully satisfied (g).

*Common.*]—Common, or right of common, appears from its very definition to be an incorporeal hereditament; being a profit which a man hath in the land of another, as to feed his beast, to catch fish, to dig turf, to cut wood, or the like. Common is chiefly of four sorts: 1, common of pasture; 2, common of piscary; 3, common of turbary; 4, common of estovers. 1. Common of pasture is the right of putting beasts to feed on another's land; and this kind of common is either appendant, appurtenant (because of vicinage), or in gross. *Common appendant* is a right belonging to the owners or occupiers of arable land to put commonable beasts upon the lord's waste. *Common appurtenant* is a common belonging to an estate for all manner of beasts, commonable or not commonable, as hogs, goats, and the like, and may be annexed to a house, &c., as well as to arable land. *Common because of vicinage* is a sort of common appendant, and is where the tenants of two lords, who are seised of two towns lying next to one another, have used, time out of mind, to have common promiscuously, and proportionately to their extent of common on both sides, for all manner of beasts commonable. This is indeed only a permissive right, which the law suffers to prevent suits in open countries, for no man can put his beasts into this kind of common but they may stray or escape of themselves from one field to another, without being guilty of trespass. Of the same nature is common of *shack*, respecting which several cases have been recently

decided (*h*). *Common in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted by deed or gained by usage. Of these commons all but the last must be *certain*, that is, for a particular number of beasts, as for ten cows, or for such as are *levant* and *couchant* on the land, whilst common in *gross* may be (according to some) *uncertain*, or without stint, either with respect to the number of cattle or length of time (*i*).—2. Common of piscary is a liberty of fishing in another man's waters.—3. Common of turbary is a license to dig turf on another's ground, or in the lord's waste, but not in exclusion to the owner of the soil, and it must be appurtenant to a *house*, and not to *land*.—4. Common of estovers, when restrained to woods, is a right of taking wood out of another's woods, for the repair or use of one's own house, &c.

Before leaving the subject of commons, we may observe that, under the 20 Hen. 3, c. 4, the lord of a manor may enclose the wastes, leaving sufficient common, and now by various local acts (consolidated by the General Inclosure Act, 41 Geo. 3, c. 109) commissioners are appointed for allotting and dividing the common fields and wastes of any parish. Still further, by the public act of the 6 & 7 Will. 4, c. 115 (see 10 & 11 Vict. c. 111), inclosures may take place in any open and common lands (not being wastes) without any other act of Parliament, provided the consent of two-thirds of the parties interested be obtained (*j*).

*Ways.*—Ways are a fourth species of incorporeal hereditament, and consist in the right of going over another man's ground. Ways may be divided into, 1, a private way; 2, a common way; and, 3, a highway. A private way is a passage or road, belonging

exclusively to a certain number of persons, leading from one particular place to another, as from a house to a church, or from village to village, or from a private house to certain fields. This species of way may be claimed by prescription or by grant, and may be either in gross or appendant to house or land. A common way is that which leadeth from a village into the fields, the freehold and property of which are in him that hath the land next adjacent, and if it be stopped, remedy lies by presentment or indictment. The King's highway is that which leadeth from village to village, or from town to town, and through which all the King's subjects have a right to pass (*h*).

*Offices.*—Offices are also incorporeal hereditaments, consisting in a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging.

*Dignities.*—Dignities are also a species of incorporeal hereditament, wherein a man may have a property or estate (*l*).

*Franchises.*—Franchises are synonymous with *liberties*, and are defined to be a royal privilege existing in the hands of a subject, either by charter, letters patent, or prescription. All liberties are derived from the Crown, and therefore they are extinguished if they come to the Crown again, by escheat, forfeiture, &c. A franchise or liberty may be vested in bodies politic or corporate, aggregate or sole, or in any persons that are not corporations, as counties, boroughs, towns, or in a single person. The several kinds of franchises are almost infinite, but the principal are as follow:—1. To have a county palatine. 2. To have a court of one's own,

with liberty to hold pleas according to the course of the common law. 3. A bailiwick is that liberty which is exempted from the sheriff of the county, over which the lord of the liberty appoints a bailiff to do such offices within his precinct, as the under sheriff doth at large under the high sheriff of the county (*m*). 4. A forest is a franchise, consisting of a certain territory of woody ground, privileged for beasts of venery, or those that are gotten by hunting, or for fowls of forest, chase, or warren, to rest and abide there in safety. The Sovereign may at this day make a forest in his own grounds, but not, according to Lord Coke, in the grounds of his subjects without their consent, and this privilege, when granted to a subject, is properly called a chase. A forest consists of eight parts, viz., soil, covert, laws, courts, judges, offices, game, and boundaries. 5. A chase is a privileged place for the receipt of deer and beasts of the forest, under a grant from the Crown, and being of a middle nature between a forest and a park. 6. A park is an inclosed chase, extending only over a man's own grounds. 7. A free-warren is a liberty by grant from the King, for the preservation of hares, conies, partridge, pheasant, quail, rail, &c., for these being *feræ naturæ*, every one had a natural right to kill them; but upon the introduction of the forest laws, these animals being looked upon as royal game, this franchise was invented to protect them. 8. A free fishery, or exclusive right of fishing in a public river, is also a royal franchise. It differs from a *several fishery*, because he that has a *several fishery* is *primâ facie* considered to be owner of the soil, while in a free fishery this is not so. It differs also from a common of piscary, for it is an exclusive right, which a common of piscary is not (*n*). 9. A fair, or market, is a privilege granted

for buying and selling, and for the more speedy and commodious provision of such things as the subject needeth (*o*). 10. Tolls also, which consist in a reasonable sum of money or payment to the owner or grantee of a port, fair or market, are franchises; and so also is the right of having the goods of felons, deodands, treasure-trove, waifs, estrays, wrecks; the nature of which we have already described (*p*). We now proceed to notice other kinds of incorporeal interests or hereditaments.

*Corodies.*—Corodies, or a right of sustenance, consisting in a right to receive certain allotments of victuals and provision for one's maintenance (*q*).

*Annuities.*—An annuity is a yearly sum, chargeable only on the person of the grantor, and therefore different from a rent-charge, which (as we shall presently see), is a burthen imposed upon and issuing out of land. A man may have an inheritance therein, but it is not therefore real estate (*r*).

*Rents.*—Rents are the last species of incorporeal hereditament, which we shall here notice. A rent is a sum of money, or other profit, (as spurs, capons, corn, &c.,) issuing periodically out of lands or tenements; and, being reserved out of the profits of the land, is not due until the tenant takes the profits. There are three sorts of rents:—1. Rent service. 2. Rent charge. 3. Rent seck.—Rent service (so called because it is ever accompanied with some corporal service), is where one, upon a gift in tail, or lease for life or years, reserves to himself a certain rent, while the reversion of the lands and tenements continue in him. A rent-charge is where a man, by deed, gives the whole of his estate over to another, and by the same deed reserveth to him and

his heirs a certain rent; and that if the rent be behind, it shall be lawful for him and his heirs to distrain. Rent seck is where a man by deed makes over the whole of his estate to another, and reserves to him and his heirs a certain rent, or grants a rent issuing out of his estate, without any clause of distress in the deed. To these three sorts of rent may be added, a rent reserved upon a lease at will, which may be distrained for of common right. There are also fee farm rents, quit rents, rack rent, old rent, and improved rent. A fee farm rent is a rent issuing out of an estate in fee, of at least one-fourth of the value of the lands at the time of its reservation. Quit-rent is a certain small rent payable yearly by the tenant of a manor, whereby he goes quit and free of all other services (*s*). Rack-rent is supposed to be a rent to the full value of the tenement, or near it. As to a rent generally, the profit must be *certain*, or that which may be reduced to a certainty by either party; and it must issue yearly. It must issue out of the thing granted, and not be part of the thing itself, which must be lands and tenements corporeal; that is, it must issue from some inheritance, whereunto the owner or grantee of the rent may have recourse to distrain: therefore, a rent cannot be reserved, in general, out of an incorporeal hereditament (*t*).

By 4 Geo. 2, c. 28, remedy by distress is given for *all rents* that have been paid within twenty years next before the making of the statute, or that shall be afterwards created; so that the difference which formerly existed between them is now abolished (*u*). Rent is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation; but in the case of the King, the payment must be either to his officers at the Exchequer, or to his receiver in the country.

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And strictly rent is demandable just before the time of sunset, though not absolutely due till midnight.

Having now finished the subject of incorporeal hereditaments, we may remark that besides the estates before mentioned there is the peculiar one termed an estate upon condition, which will be the subject of the next chapter.

## CHAP. XXII.

## ESTATES UPON CONDITION.

[See 2 Black. Com. ch. 10; 1 Steph. Com. ch. 6; Litt. Ten. pp. 187, 188.]

Estates on condition are,—1. On condition implied; 2. On condition expressed; or as they are called by Littleton, estates upon condition in law, and condition in deed (*a*). Estates upon condition in law are such as have a condition by the law annexed to them, although it be not specified in writing; as, if a man grant by his deed to another an office, the law annexes a condition, that he shall do that which to such office belongeth, or otherwise the grantor and his heirs may oust him, and grant it to another. An estate on condition expressed, or in deed, is where an estate is granted, either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition; as if a man grant to his lessee for years, that upon payment of 100 marks within the term, he shall have the fee; or grants an estate to a man and his heirs, *tenants of the manor of Dale* (by some



termed a conditional limitation); or if a man by deed indented, enfeoffs another in fee simple, reserving to him and his heirs a certain yearly rent, payable at a particular time, on condition that if the rent be behind, the feoffor and his heirs may re-enter. These conditions, therefore, it will be seen, are either precedent or subsequent. Precedent are such as must happen or be performed before the estate can vest or be enlarged. Subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. Among the estates defeasible by condition subsequent are, mortgages, of which one is termed *vivum vadium*, and the other *mortuum vadium*. (*b*). The former is of no practical importance.

*Mortgages.*—Mortgage, or dead pledge, in Latin *mortuum vadium*, is where a man borrows of another a specific sum, and grants him an estate in fee, or for a long term of years, on condition that if he the mortgagor shall repay the money on a certain day, he may re-enter on the estate so mortgaged, or, as is now the more usual way, that the mortgagee shall re-convey the estate to the mortgagor; in this case the land is *at law*, in case of non-payment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute. But so long as it continues conditional, that is, between the time of lending the money and time allotted for payment, the mortgagee is called tenant in mortgage.

As soon as the estate is created, the mortgagee may enter on the lands, except there be a stipulation to the contrary (*c*); but is liable to be dispossessed, upon the performance of the condition by payment of the mortgage-money at the day limited, and

therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment, when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here again the courts of equity interpose; and though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the common law, yet courts of equity will allow the mortgagor at any time within twenty years after the mortgagee's taking possession, or after an acknowledgment in writing (*d*), to recall or redeem his estate, paying to the mortgagee his principal, interest, and expenses. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*, and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest, thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately, or else call upon the mortgagor to redeem his estate presently, or, in default thereof, to be for ever *foreclosed* from redeeming the same, that is, to lose his equity of redemption without possibility of recall (*e*); and also, in some cases of fraudulent mortgages, the fraudulent mortgagor forfeits all equity of redemption whatsoever (*f*). Where the mortgagor neglects the payment of principal and interest, the mortgagee may bring an ejectment, and take the land into his own hands, in the nature of a pledge (*g*). But by statute 7 Geo. 2, c. 20, after payment or tender by the mortgagor of principal, interest,

and costs, the mortgagee can maintain no ejectment, and may be compelled to re-assign his securities (*h*).

*Statute merchant and statute staple.*—These are estates created by 13 Edw. 1, st. 3, c. 1, and 27 Edw. 3, c. 9, whereby the lands of a debtor are conveyed to his creditors, till out of the rents and profits of them the debt may be satisfied. There is also a recognisance in the nature of a statute staple, the benefits of which were extended by 23 Hen. 8, c. 6, amended by 8 Geo. 1, c. 25. These securities are now, however, fallen into desuetude.

*Estate by elegit.*—An estate by elegit is an estate obtained by process of law after a plaintiff has obtained judgment for his debt; for on a writ of elegit the sheriff gives him possession of the defendant's lands and tenements until the debt and damages be fully paid. Formerly only one moiety of the defendant's lands could be delivered, but by the 1 & 2 Vict. c. 110, s. 11, the whole may in general be delivered to the plaintiff (*i*).

We have hitherto spoken of what are termed legal mortgages, but it should be mentioned that there are also equitable mortgages, by which are commonly meant mortgages by deposit of title deeds, and indeed, strictly speaking, all mortgages after one in fee are equitable (*k*).

## CHAP. XXIII.

## ESTATES IN EXPECTANCY.

[See 2 Black. Com. ch. 11; 1 Steph. Com. ch. 7.]

We are now to consider estates with respect to the time of their enjoyment, and in this point of view they may be either in possession or expectancy. Estates in possession are where a present right of possession passes to and resides in the tenant, not depending on any subsequent circumstance or contingency. Estates in expectancy are of two kinds—1, a remainder; 2, a reversion.

*Remainders.*—A remainder, which is created by the act of the parties, may be defined to be an estate limited to take effect and be enjoyed after another estate created at the same time is determined; as if a man seised in fee lets lands or tenements for term of years, the remainder over to another for life, in tail or in fee; here is first a particular estate, derived out of a general and greater estate, viz., a fee, and afterwards the residue or remainder disposed of; but it must be observed that, in contemplation of law, the particular estate, and all remainders on it, make but one estate in law (*a*). The following rules are to be observed in the creation of remainders:—

1. There must be a *particular* estate precedent made at the same time, that the remainder may depend on it.

2. The particular estate must formerly have continued up to the time when the remainder vested, and the remainder must have vested at the latest at the time the particular estate ended; for there could not have been an interval between them, for in such case the remainder, which, of course, is to be understood as being a contingent one, would have nothing to support it, and would therefore have been destroyed. But now, by the 8 & 9 Vict. c. 106, s. 8, the determination of the particular estate is not to destroy the remainder, which, it is thereby declared shall, notwithstanding such determination, be capable of taking effect (*b*).

3. The remainder must pass out of the grantor or lessor at the time of the possession taken by the particular tenant.

4. The person to whom the remainder is limited must be capable, at the time it was created, or else by common possibility, or in *potentiâ propinquâ*, to be thereof capable during the particular estate. Thus a remainder to the first-begotten son of J. S. (in general terms), born during the particular estate, is good; but if the remainder had been limited in particular by name of baptism and surname, it had not been good, if he was not *in esse*, for it was *potentiâ remota*, and not probable that J. S. should have a son of that name (*c*).

*Vested and contingent remainders.*]—Remainders are either vested or contingent. A vested remainder is that which depends upon a certain event, upon the happening of which it must unavoidably vest, as a lease for years, remainder to another in fee, or in tail, &c. A contingent remainder is a

remainder limited, so as to depend on an event or condition which may never happen or be performed or which may not happen or be performed till after the determination of the preceding estate; for if the preceding estate determines properly before such event or condition happens, the remainder will never take effect. As we have above stated, the 8 & 9 Vict. c. 106, s. 8, preserves a remainder from destruction by reason of the *premature* failure of the preceding estate; but it gives no support to those which were originally limited without such estate, or to those which are not vested when the preceding estate determines by effluxion of time. There are four sorts of contingent remainders, which may be comprehended under the above definition:—First. Where the determination of the preceding estate is itself dubious and contingent, as where it depends on an event which may never happen.—Secondly. Where the contingency on which the remainder is to take effect is independent of the determination of the preceding estate.—Thirdly. Where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it.—Fourthly. Where the person to whom the remainder is limited is not yet ascertained, or not yet in being, as if a lease be made to one for life, remainder to the right heirs of J. S.; now there can be no such person as the right heirs of J. S. until the death of J. S., for *nemo est hæres viventis*, which may not happen till after the determination of the particular estate, by the death of the tenant for life; therefore such remainder is contingent. Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any other particular estate less than a freehold. Thus, if land be granted to A. for ten years, with

remainder in fee to the right heirs of B., it is void; but if granted to A. for life, with a like remainder, it is good (*d*). In devises, however, by last will and testament, remainders, or, as they are more usually called, *executory devises*, may be created contrary to the rules before laid down; for wills are always more favoured in construction than formal deeds (*e*).

*Executory devises.*]—An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency, and it differs from remainder—First. That it needs not any particular estate originally created to support it. Secondly. That by it a fee simple, or other less estate, may be limited after a fee simple. And thirdly. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same (*f*).

*Reversions.*]—A reversion is the residue of the estate left in the grantor after some particular estate granted away; as if one seised in fee make a gift in tail, the reversion of the fee simple is in the donor. So, also, if one hath a lease for twenty years, and leases out ten of those years, the reversion is in the second lessor as well as in the first that granted the twenty years. A reversion is never created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. To the reversion are incident fealty and rent. By a general grant of the reversion, the rent passes thereby as incident thereto, but by the grant of the rent generally the reversion will not pass (*g*). Where a freehold reversion is expectant on a particular estate of freehold, the reversioner is said to be seised as of fee or of freehold; but if the free-

hold reversion be expectant on an estate for years, the reversioner is said to be seised of the land in his demesne as of fee, that is, he is considered for many purposes as having a freehold estate in possession (*h*).

It should be borne in mind that where a man has two estates in one and the same right, without any intervening interest, the former estate is merged in the latter. Thus, if the reversion in fee descends to or is purchased by the tenant for life or for years, the life estate or term for years is merged in the fee simple. But a tenancy in tail will not so merge (*i*).



## CHAP. XXIV.

## JOINT ESTATES.

[See 2 Black. Com. chap. 12; 1 Steph. Com. chap. 8; Litt. Ten. pp. 100—137.]

Estates are also to be considered with respect to the number and connections of their owners.

*Tenant in severalty.*—A sole tenant is he that holds lands or tenements in his own right only (that is, in severalty), without any other person being joined or connected with him in point of interest during his estate therein. This is the most common and usual way of holding an estate; and they are all supposed to be of this sort, unless where they are expressly declared to be otherwise.

*Joint-tenancy.*—Joint tenancy, so called because the lands or tenements, &c., are conveyed to the tenants jointly, in contradistinction from sole or several tenants, is where lands or tenements are granted to two or more persons to hold in fee simple, fee tail, for life, for years, or at will. But this species of estate can only arise by the act of the parties, and never by the act of law. Joint-tenants must have one and the same *interest*, and therefore one cannot

be tenant for life and the other for years; or the one tenant in fee and the other in tail. They must also have a *unity of title*—that is, their estate must be created by one and the same act. There must also be a *unity of time*—that is, their estates must be vested at one and the same period, as well as by one and the same title: and, lastly, there must be a *unity of possession*, for joint-tenants are seised *per my et per tout*, by the half or moiety and by all; “and this,” says Littleton, “is as much as to say that he is seised by *every parcel*, and by the *whole*” (a). The grand incident of a joint estate is, that the tenants are entitled to the *jus accrescendi*, or benefit of survivorship; for when two or more persons are seised of a joint estate of inheritance for their own lives, or *pur autre vie*, or are jointly possessed of any chattel interest, the entire tenancy, upon the decease of any of them, remains to the survivors; but if they agree to part their lands and hold them in severalty, as the tenancy is severed and destroyed by a disuniting of their possession, so the right of survivorship is, by such separation, also destroyed; and by 31 Hen. 8, c. 1, and 32 Hen. 8, c. 32, one joint-tenant might have compelled his co-tenants, by writ of partition, to divide the land; but the writ of partition is now abolished by the 3 & 4 Will. 4, c. 27, s. 36, and recourse must now be had to a court of equity to obtain a compulsory partition (b). A joint-tenancy may also be destroyed by destroying the unity of title; as if a man enfeoff two joint-tenants in fee, and one of them aliens his moiety to another in fee; for the grantee and the remaining tenant hold by different titles. So also if the unity of interest be severed, the joint-tenancy is destroyed; therefore, where there were two joint-tenants for life and one of them purchased the reversion by fine, it was held that the joint estate was thereby severed

and destroyed. In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure; so, also, if there be two joint-tenants for life and the inheritance descends upon one of them (c).

*Tenancy in common.*]—Tenants in common are where two or more have lands and tenements in fee simple, fee tail, for life, or years, by several titles, or by one title and several rights, and none of them knoweth his own part, but takes the profits in common with his companions. This estate may be created by destroying the unity of title or interest in a joint-tenancy or coparcenery, and preserving the unity of possession: as if one of two joint-tenants in fee aliens his estate for the life of the alienee; in this case the alienee and the other joint tenant are tenants in common. So also, if there be a grant to a man and woman, and the heirs of their bodies, their issues shall be tenants in common. This estate may also be created by express limitation in a deed; as if lands be given to two or more, and words which rebut a joint-estate are used, as “jointly and severally,” they shall be tenants in common. It is said that an estate to A. and B. “equally to be divided between them” is in common law conveyances a joint-tenancy, but such a limitation in conveyances founded on the statute of uses or in wills gives a tenancy in common. In fact the leaning of the present time is in favour of a tenancy in common, though anciently the contrary was the case (d). Estates in common can only be destroyed by uniting all the titles and interests in one tenant, or by making a partition as before-mentioned (e).

*Coparcenary.*]—Coparceners are, where lands of inheritance descend from the ancestor to two or

more persons: as by the common law, where tenant in fee simple or in fee tail dies and hath no issue but daughters, or dies without issue, and leaves only sisters, aunts, cousins, or their representatives; for in this case they shall all inherit, making together one heir to their ancestors, and having one freehold among them: or as by custom, where lands descend to all the sons alike, as in the tenure of gavelkind (*f*). There must be a union of interest, title, and possession to form a coparcenary; but there is no unity of time necessary to this estate. The tenants may sue and be sued jointly; and the entry of one of them shall in some cases be the entry of all. They are entitled each to the whole of a distinct moiety, and of course there is no benefit of survivorship; for each part descends severally to their respective heirs, though the unity of possession continues. They are called parceners because they were always compellable by the writ *de Partitione Faciendâ* to make partition prior to its abolition, and the remedy is now in equity (*g*); but the estate may also be dissolved by consent, by the alienation of one parcener, or by the whole at last descending to and vesting in a single person (*h*).

## CHAP. XXV.

## TITLE BY INVOLUNTARY TRANSFER.

[See 2 Black. Com. chaps. 13—18; 1 Steph. Com. chaps. 10—14.]

And having thus described the nature of estates in real property we shall just mention the *title* to them, and then proceed to inquire by what means lands, tenements, or hereditaments may be lost or acquired.

## SECT. I.—TITLE TO THINGS REAL IN GENERAL.

[2 Black. Com. chap. 13; 1 Steph. Com. chap. 10.]

A title is the means whereby the owner of lands hath the just possession of his property. To form a complete title to lands, tenements, or hereditaments, it is necessary that the right of possession, the right of property, and the actual possession should be conjoined, the *juris et seisinæ conjunctio*; for then, and then only, is the title completely legal. The lowest degree of title, therefore, consists in the mere naked possession, without any apparent right; as where the disseisor procures by the wrongful act of disseisin, without any shadow or pretence of right,

the actual occupation of the estate, or mere naked possession. The second step, therefore, to a good and perfect title is, to procure the right of possession. Right of possession is of two sorts: an apparent right of possession, which may be defeated by proving a better; and an actual right of possession, which will stand the test against all opponents.

The acquisition of an estate is commonly said to be either by descent or purchase (these being the principal methods); but, more accurately speaking, it is either by act of law or act of the party, which last is technically called purchase. Title by act of law expresses all those modes of acquisition where the law itself casts the right to the estate upon the acquirer, independently of any act of interference of his own, or of any other person for that purpose. Of these the principal kind is title by descent; but the term will also properly include title by escheat, and also that of tenant by the curtesy and of tenant in dower. Purchase, on the other hand, though in its vulgar and confined acceptation it is applied only to such acquisitions of land as are obtained by way of bargain and sale for money, or some other valuable consideration, yet properly includes every lawful mode of coming to an estate by the act of a party as opposed to the act of law, among which are ordinarily ranged title by occupancy, by forfeiture, and by voluntary transfer, which last is also usually described as that by alienation or conveyance. However, we have thought it best to make a division into title by involuntary transfer and by voluntary transfer, including under the latter, conveyances *inter vivos* and devises (*a*).

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### SECT. II.—TITLE BY OCCUPANCY.

[See 2 Black. Com. ch. 16; 1 Steph. Com. ch. 13.]

Occupancy is taking possession of those things which before belonged to nobody, and by the common law was confined entirely to the case where tenant *pur autre vie* died while *cestui que vie*, or he for whose life the lease was made, was living, and a stranger gained possession of the vacant estate, who was thereby entitled to hold it during the life of the *cestui que vie*, and was called a general occupant: but estates *pur autre vie* may now be devised by will; or if the lessee dies intestate, his heir when named in the grant is ordained special occupant, and is chargeable as in other cases of assets by descent; and if there be no heir named the estate shall go to the party's personal representatives, and will be assets in his hands to be distributed in the course of administration (*b*).

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### SECT. III.—TITLE BY DESCENT.

[See 2 Black. Com. ch. 14; 1 Steph. Com. ch. 11.]

Descent, or hereditary succession, is a means whereby one derives his title to certain lands as heir, and by right of blood, to some ancestor, unless hindered by illegitimacy, attainder, alienage, or act of Parliament. And this is the noblest and most worthy means by which real property is acquired. A descent is either by the common law, by custom, or by statute. 1. By the common law; as where a man hath land of inheritance in fee simple, and dies without disposing of it in his life-time; for in such case the law casts the estate on the heir immediately on the death of the ancestor, and so, descending to him, is called his in-

heritance. 2. By custom; as in tenures by gavel-kind, borough English, and several others, where the lands descend to all the sons, or all the brothers, according as the custom may be. 3 By statute; as in the case of estates in tail, by virtue of the statute *De Donis*, where the descent is restrained and regulated according to the words of the original donation. Descent is by reason of *consanguinity*, and is either lineal or collateral. Lineal is a descent downwards in a right line, as from grandfather to father and grandson, and *vice versâ*. Collateral is a descent which springeth out of the side of the whole blood, as grandfather's brother, father's brother, &c.; and therefore, if a man purchase land in fee simple, and die without issue, there, for default of the right line, he who is next of kin, either personally, or *jure representationis*, though never so remote in the collateral line of the whole blood, comes in by descent to such deceased ancestor. There is a next of kin by right of representation, and a right of kin by right of propinquity or nearness of blood; and whoever is inheritable is accounted next of blood with respect to inheritances (c). But this will be better explained by stating the rules by which estates are transmitted from the ancestor to the heir. And here it must be noticed that by the new Inheritance Act, 3 & 4 Will. 4, c. 106, great alterations have been introduced into the laws of descent, but as by sect. 11 the act is not to extend to any descent which shall take place on the death of any person who shall die before the 1st of Jan. 1834, it will be necessary to know the old laws or canons of descent as well as the new ones. We therefore first notice the old canons, so elaborately explained by Mr. Justice Blackstone, and which are as follow (d):—

1. "Inheritances shall lineally descend to the



issue of the person last actually seised *in infinitum*, but shall never lineally ascend." Therefore, if there be grandfather, father, and son, and the father purchases land and dies, his son shall succeed him as heir, but not the grandfather; for, formerly, *hæreditas nunquam ascendit*. Now, however, the grandfather would succeed on failure of descendants of the son. And the inheritance is not to be traced from the person last seised, but from the purchaser (e).

2. "The male issue shall be admitted before the female." Thus sons, who are considered in law as the worthiest of blood, shall be admitted before daughters: as if a man hath two sons and two daughters, and dies, the eldest son, or in case of his death without issue, the second son, shall succeed in preference to both the daughters. This is not altered by the new act (f).

3. "Where there are two or more males in equal degree, the eldest only shall inherit, but the females all together." Thus, as before, if a man hath two sons and two daughters, and dies, his eldest son shall alone succeed to his estate, in exclusion of the second son; but if both the sons die without issue before the father, the daughters shall both inherit the estate as coparceners. The same is now the case (g).

4. "The lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living." Thus, the child, grandchild, or great-grandchild, either male or female, of the eldest son, succeeds before the youngest son, and so *in infinitum*. But these representatives shall neither take more nor less than their principals would have down. This taking by representation is called *succession in*

*stirpes*, according to the *roots*. This is not affected by the new act (*h*).

5. "On failure of lineal descendants, or issue of the person last seised, the inheritance shall descend to the blood of the first purchaser, subject to the three preceding rules." The first purchaser is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method except that by descent. Thus, if A. purchases land, and it descends to his son, who dies without issue, whoever succeeds to this inheritance must be of the blood of A. the first purchaser; and the remaining rules are only calculated to investigate who that purchasing ancestor was. By the new act the descent is not in any case to be traced from the person last seised, but always from the purchaser, but the last person from whom the land shall have been proved to have been inherited is to be considered as the purchaser, unless it be proved that he inherited the same (*i*).

6. "The collateral heir of the person last seised must be his next collateral kinsman of the whole blood:" that is, he must be his next collateral kinsman, either personally or *jure representationis*; which consanguinity is reckoned according to the canonical degrees of consanguinity. Thus, when a man hath two sons, A. and B., and dieth; and B. hath two sons, C. and D., and dieth, but C., the eldest son of B., hath issue before his death; if A., having purchased lands in fee-simple, die without issue, his nephew D., though nearest in blood to him, shall not inherit; but the issue of C., who represents the person of C., and who, if he had lived, would have been legally next of blood to A. (*j*). The half-blood was formerly excluded, but now it is only postponed, as hereafter explained (*k*).

7. "In collateral inheritances the male stocks

shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, shall be admitted before those of the blood of the female), unless where the lands have in fact descended from a female. Thus, the relations on the father's side are admitted *in infinitum* before those on the mother's side are admitted at all; and the relations of the father's father before those of the father's mother, and so on; and by the new act (s. 8) confirming Blackstone's positions, the mother of the more remote male ancestor is to be preferred to the mother of the less remote male ancestor (1).

The rules of descent as they stand under 3 & 4 Will. 4, c. 106, are as follow:—1. In every case the descent shall be traced from the *purchaser*, and not, as formerly, the person last seised. We have already stated who is to be considered the purchaser. 2. That inheritances shall, in the first place, lineally descend to the issue of the purchaser *in infinitum*. 3. That the children of the purchaser are preferred to their own issue: and among such children males to females, and an elder male to a younger; but females (where there are several) take together. 4. That the issue of the children of the purchaser represent or take the place of their parents *in infinitum*, the children of the same parent being always subject (among each other) to the same law of inheritance as contained in the third rule. 5. That on failure of the issue of the purchaser, the inheritance shall go to the nearest lineal ancestor then living in the preferable line; supposing no issue of a nearer ancestor in that line to exist. 6. That among the lineal ancestors of the purchaser, the paternal line (whether of the purchaser or of any ancestor, male or female) is always preferred to the maternal. 7. That where an ancestor, to whom, if living at the purchaser's death,

the inheritance would have descended, dies before the purchaser, leaving issue, the issue of such ancestor *in infinitum* shall represent him, according to the same rule of succession as before laid down with respect to the issue of the purchaser; but with the addition, that those related by the whole blood to the purchaser are preferred to those related by the half-blood. That is, the half-blood on the part of a male ancestor inherits after the whole blood of the same degree; if on the part of a female, immediately after her (*m*).

By the new act (sect. 5) it is provided that a descent between brothers and sisters shall be traced through the parent, and not, as formerly, immediately from each other. By sect. 10, after the death of a person attainted (where the death happens prior to the descent), his descendants may inherit. See further as to attainder the 54 Geo. 3, c. 145, mentioned under the title "*Escheat*" (*n*).

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#### SECT. IV.—TITLE BY ESCHEAT.

[See 2 Black. Com. ch. 16; 1 Steph. Com. ch. 12.]

Escheat is when lands fall by accident to the lord of whom they are holden; and is founded on the principle, that the blood of the person last seised in fee simple is, by some means or other, utterly extinct and gone. Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter defectum tenentis*: the one sort, if the tenant dies without heirs, and the other, if his blood be attainted. But they may both be resolved into deficiency of blood, for he that is attainted suffers an extinction of blood, as well as he who dies without relations (*o*). Therefore, when a man dies without

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any relations on the part of any of his ancestors, or of those ancestors from whom his estate descended, or formerly without any relations of the whole blood (for the land should rather have gone to the lord than to the half-blood), the land shall escheat to the lord of the fee. So also, where there happens to be no other heir than a monster, a bastard, an alien, or a person attainted, the estate shall escheat; for they cannot succeed to it, as not having any inheritable blood; and therefore, the superior lord, as *ultimus hæres*, shall have it by escheat. In the cases of aliens and persons attainted, we have seen that the descent may be traced through them (*p*). And, indeed, by the 54 Geo. 3, c. 145, no attainder for felony, except for treason or murder, shall extend to the disinheriting of any person (*q*). By several statutes (*r*) where a trustee or mortgagee dies without an heir (or his heir is not known), the Court of Chancery may direct a proper conveyance to be made. And by one of the acts, 4 & 5 Will. 4, c. 28, no lands, chattels, or stocks vested in any trustee or mortgagee shall escheat or be forfeited by their attainder or conviction by reason of any crime.

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### SECT. V.—TITLE BY PRESCRIPTION.

[See 2 Black. Com. ch. 18; 2 Steph. Com. p. 84—42.]

Prescription is a title to incorporeal property by purchase; as where a man can show no other title to what he claims, than that he and those under whom he claims, have immemorially enjoyed it (*s*). The distinction between a custom and a prescription is, that custom is a local usage, and not annexed to any person; prescription is a mere personal usage.

All prescription must be either in a man and his ancestors, or in those whose estate he hath, which last is called, prescribing in a *que estate*. Nothing but incorporeal inheritances can be claimed by prescription, as a right of way, a common, &c.; for no prescription can give a title to lands or other corporeal substances, of which more certain evidence may be had. A prescription in a *que estate* must always be laid in the tenant of the fee; and, therefore, a tenant for life, for years, or at will, cannot prescribe; for as prescription is usage beyond time of memory, it is absurd for them to prescribe whose estates commenced within the remembrance of man. A prescription also cannot be for a thing which cannot be raised by grant, for the law allows prescription only to supply the place of grant, and therefore every prescription supposes a grant to have existed (*t*). Also, that which is matter of record cannot be prescribed for, but must be claimed by grant entered on record. Among things incorporeal which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and ancestors; for if he prescribe in a *que estate*, nothing is claimable but such things as are incident, appendant, or appurtenant to the lands.—Estates gained by prescription are not, as a matter of course, descendible to the heirs general (*u*). Immemorial usage, we have seen (p. 7), must have been prior to 1 Rich. 1, but the courts were in the habit of allowing twenty years unrebuted user to sustain a prescriptive claim. Now, however, the 2 & 3 Will. 4, c. 71, (p. 7), dispenses with the necessity of making out an immemorial usage, either by presumption or otherwise, and allows an enjoyment for thirty or sixty years in profits *à prendre* and twenty

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or forty years in easements to constitute a direct and intrinsic right (*v*).

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### SECT. VI.—TITLE BY FORFEITURE

[See 2 Black. Com. ch. 19; 1 Steph. Com. ch. 14.]

Forfeiture is a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein; and is occasioned by—1. Crimes and misdemeanours. 2. By alienation contrary to law. 3. By non-presentation to a benefice. 4. By simony. 5. By non-performance of conditions. 6. By waste. 7. By breach of copyhold customs, and 8. By bankruptcy (*w*).

1. *Crimes and misdemeanours*.—The offences which induce a forfeiture of lands and tenements to the Crown are principally—1. Treason. 2. Felony (*a*). 3. Misprision of treason. 4. *Premunire*. 5. Drawing a weapon on a judge, or striking in the King's court of justice. As to trustees or mortgagees, see the title "Escheat."

2. *By alienation contrary to law*, which is either in mortmain, to an alien, or by particular tenants. Alienation in mortmain, *in mortuâ manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But appropriators may annex the great tithes to vicarages; and small benefices may be augmented by the purchase of lands, without license in mortmain. A man also may give lands to the maintenance of a school, an hospital, or any other charitable uses. But by 9 Geo. 2, c. 36, no lands or tenements, or money to be laid out thereon, shall be given for, or charged with any charitable uses whatever, unless

by deed executed as the act describes. The universities and colleges thereof, and also the foundation of Eton, Winchester, and Westminster, are excluded from the operation of the act; as is also the British museum (*z*). Alienation to an alien is also cause of forfeiture, for an alien is incapable of holding lands (*y*). Alienation by particular tenants was when they granted estates greater than the law entitled them to make, and thereby they divested the remainder or reversion; as if tenant for his own life aliened by feoffment and fine for the life of another, or in tail, or in fee. But now fines are abolished, and by sect. 4 of 8 & 9 Vict. c. 106, a feoffment is not to have any tortious operation, consequently it should seem that no conveyance can now work a forfeiture, as all conveyances must now be considered as being innocent conveyances (*aa*).

3. *Lapse* is a title given to the ordinary to collate to a church, by the neglect of the patron to present to it within six months after avoidance; or it is a devolution of the right of presenting from the patron to the bishop; from the bishop to the archbishop; from the archbishop to the King. The term from which the title by lapse commences, from one to the other successively, is six months, that is, 182 days. But if the bishop be both patron and ordinary, he shall have a double time allowed him to collate in; for the forfeiture accrues by law, whenever the negligence has continued six months in the same person. The patron is bound at his peril to take notice of a benefice become void by death, creation, or cession; but if the avoidance happens by resignation, or deprivation, the ordinary must give notice to the patron, and from such notice only does the six months begin. No donative (p. 155) can lapse, except it has been augmented by Queen Anne's bounty (*ab*).



4. By simony, the right of presentation to a living is forfeited, and vested *pro hac vice* in the Crown. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward, contrary to the statutes 31 Eliz. c. 6, and 12 Anne, st. 2, c. 12. Resignation bonds are allowed by the 9 Geo. 4, c. 94 (*a c*).

5. By waste, which is a spoil or destruction in houses, gardens, orchards, dove-houses, &c., to the prejudice of the heir, or of him in remainder or reversion. It is either *voluntary* or *permissive*, as by doing the waste, or suffering it to be done; and whatever does a lasting damage to the freehold or inheritance is waste (*a d*). Tenant in fee simple or fee tail is not liable for waste, and sometimes a lessee for life or years is expressly exempted from liability for waste, and is then said to be a tenant without impeachment of waste. (*a e*).

6. Breach of customs, as of those customs of particular manors, by which copyhold estates are holden, and for which the lord may seise them again into his hands (*a f*).

Bankruptcy is sometimes considered a species of forfeiture, and so is insolvency, but they are rather involuntary transfers strictly so called than forfeitures. These two subjects will be hereafter noticed (*a g*).

## CHAP. XXVI.

## TITLE BY VOLUNTARY TRANSFER.

[See 2 Black. Com. ch. 19—22; 1 Steph. Com. ch. 15—19.]

Voluntary conveyances may be divided into those *inter vivos* and those not so, the latter corresponding to devise, whilst the former include conveyances, 1. By deed; 2. By record; and 3. By special custom. These conveyances will be considered in this chapter, whilst the subject of devise will be considered by itself. But, before we examine these several species of conveyance, it may be necessary to recapitulate, that persons attainted of treason, felony, and *præmunire*, are incapable of conveying, from the time of the offence committed, provided attainder follows (*a*); that idiots, and persons of *non sane* memory, infants (p. 39) and persons under *duress*, are not totally disabled, either to convey or purchase, but *sub modo* only; for their conveyances and purchases are voidable, but not in general actually void; that a *feme covert* may purchase an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids it by some act, declaring his dissent; and that an alien may purchase anything but cannot hold anything, except a lease for years (p. 77).

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### SECT. I.—OF DEEDS GENERALLY.

[See 2 Black. Com. p. 295—309; 1 Steph. Com. ch. 16.]

A deed, in the understanding of the common law, is an instrument written on parchment or paper, comprehending a contract betwixt party and party. A deed must be between persons able to contract, and to be contracted with, upon good consideration, either written or printed; and the matter legally and orderly set out. The formal and orderly parts of a deed are—1. The *premises* in which the number, names, additions, and titles of the parties are set forth. 2. The *habendum* and *tenendum*; the office of which is, to determine what estate or interest is granted by the deed. 3. The *reddendum*; or reservation, whereby the grantor reserves something to himself out of the thing granted. 4. A condition, which is a clause of contingency, on the happening of which the estate granted may be defeated. 5. The warranty, whereby the grantor, for himself and heirs, warrants or secures to the grantee the estates so granted. But the effect of warranty is taken away by the 3 & 4 Will. 4, c. 74, s. 14. 6. The *covenants*, which are clauses of agreement contained in the deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform or give something to the other. 7. The *conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly, or by reference to some day and year before mentioned. Of deeds, there are two kinds, namely—deeds indented and deeds poll. An indenture is a conveyance, the paper or parchment of which is indented or cut unevenly, and made to tally with its counterparts; for being made by more parties than one, there ought to be regularly as many copies as there are parties. By s. 5 of 8 & 9 Vict. c. 106,

a deed purporting to be an indenture shall have the effect of an indenture though not actually indented (*b*). A deed poll is made by one party only, and is not indented; but is polled or shaven quite even. To make a good deed, it must be read to any of the parties who desire it; for otherwise, as to him, it is void. So also, the party whose deed it is should *seal*, and, in most cases, *sign* it; but the most essential requisite is its *delivery*, for it takes its effect entirely from this ceremony. The delivery may be either to the party himself, or to a third person, on condition, and it is then called an escrow (*c*). To commemorate the execution, it is usual that the execution should be attested in the presence of credible witnesses. The consideration of a deed may be either a good or a valuable one. A *good* consideration is such as that of blood or of natural love and affection; where a man grants an estate to a near relation, being founded on motives of generosity, prudence, and natural duty; a *valuable* consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant. Deeds made without any consideration whatever, or even those made for good, though not for valuable consideration, are said to be voluntary; and by force of the statute 27 Eliz. c. 4, voluntary deeds are void as against *bonâ fide* purchasers, and also void by 13 Eliz. c. 5, as against creditors, where the grantor is indebted at the time. So all deeds are liable to be impeached if founded on immoral or illegal consideration, or if obtained by fraud. But in general, their legal efficacy will not be prevented by the mere want of consideration. For in this respect they are distinguished from simple contracts, that is, contracts not under seal; to the validity of which some consideration is essential (*d*).

## SECT. II.—CONVEYANCES AT COMMON LAW.

[See 2 Black. Com. chaps. 307—329; 1 Steph. Com. chap. 17.]

Of deeds there are the following kinds:—1, Feoffment; 2, Gift; 3, Grant; 4, Lease; 5, Exchange; 6, Partition, which are called original conveyances, because by means thereof the estate is first created; but there are others also, as—7, Release; 8, Confirmation; 9, Surrender; 10, Assignment; 11, Defeasance, which are called derivative conveyances; because the estate originally created is thereby enlarged, restrained, transferred, or extinguished. These are all of them conveyances at the common law, leaving still some conveyances by statute law, or, as they are more usually denominated, conveyances which have their operation by the statute of uses.

*Feoffments.*—A feoffment is properly *donatio feudi*, and may be defined, a gift of any corporeal hereditament to another. He that so gives or enfeoffs is called the feoffor, and the person enfeoffed is denominated the feoffee. To a deed of feoffment livery of seisin always was and still is an indispensable requisite; for without it the feoffee has but a mere estate at will; and this ceremony consists in the delivery of corporeal possession of the land or tenement. Indeed, the transaction derives its legal force from the livery, and not from the written instrument. Livery of seisin is either in deed or in law. In deed, as when the feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney, come to the land, or to the house, and there in the presence of witnesses declare the contents of the feoffment or lease on which livery is to be made, and the feoffor delivers to the feoffee, all other persons being out of the pre-

mises, a clod, or turf, or twig, in the name of seisin. Livery in law is where the same is not made on the land, but in sight of it only, the feoffor saying to the feoffee, "I give you yonder land; enter and take possession." But this livery in law cannot be performed by attorney. A feoffment was formerly a *tortious* conveyance, but that effect has been taken away by 8 & 9 Vict. c. 106, s. 4 (*e*).

2. *Deeds of gift.*—A deed of gift is properly applied to the creation of an estate in tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of the estate passing by it.

3. *Grants.*—A grant was formerly the instrument used for transferring the property of incorporeal hereditaments, or such things whereof no livery could be had, for which reason all corporeal hereditaments were said to lie in *livery*, and all incorporeal to lie in *grant*. This distinction, however, has been abolished, so far as relates to conveyances, it being enacted by the 8 & 9 Vict. c. 102, s. 2, that the immediate freehold of corporeal tenements shall be deemed to lie in *grant* as well as in *livery* (*f*). The immediate freehold of corporeal hereditaments will now, therefore, pass merely by the delivery of the deed, the same as incorporeal hereditaments and estates in expectancy. The operative words of the grant are *dedi et concessi*, "have given and granted," which formerly implied a covenant in law or general warranty, but by the 8 & 9 Vict. c. 106, s. 4, the effect is taken away, except as to conveyances under acts of Parliament (*g*).

4. *Leases.*—A lease is properly a conveyance of

any lands or tenements, in consideration of rent or other annual recompense made for life, for years, or at will, but always for a less time than the lessor hath in the premises; for if it be of the whole interest, it is more properly an assignment. The usual words of operation in it are, "demise, grant, and to farm let." By 32 Hen. 8, c. 28, tenant in tail may make leases to bind the issue in tail, but not those in remainder or reversion (*h*). A husband seised in right of his wife in fee simple, or fee tail, may, with her concurrence, make leases to bind her and her heirs; and all persons seised in fee in right of their churches, except parsons or vicars, may make leases to bind their successors, to endure for three lives, or one-and-twenty years; but all such leases must be by indenture; must commence immediately, and not at a future period; must be made within a year of the expiration of any former lease; be either for one-and-twenty years, or three lives, and not for both; must be of lands and tenements; or, by 5 Geo. 3, c. 17, of tithes or other incorporeal hereditaments; commonly let for twenty years last past, reserving the most usual and customary rent, and not be made without impeachment of waste. But by 1 Eliz. c. 19, all grants by archbishops and bishops, which include those confirmed by dean and chapter, other than for one-and-twenty years, or three lives from the making, or without reserving the usual rent, shall be void, excepting grants made to the Crown; and by the 13 Eliz. c. 10, 14 Eliz. cc. 11 and 14, 18 Eliz. c. 11, and 43 Eliz. c. 29, all ecclesiastical corporations are restrained from making any leases exceeding twenty-one years, or three lives from the making (except houses in market towns), on which the accustomed rent, or more, shall not be yearly reserved;

and where there is an old lease in being, no concurrent lease shall be made, unless where the old one will expire within three years. The 6 & 7 Will. 4, cc. 20, 64, regulate the *renewal* of ecclesiastical leases. By the 5 & 6 Vict. c. 27, the incumbent may, with the consent of the patron and bishop, lease for fourteen years, or in some cases for twenty years; and, finally, by 5 & 6 Vict. c. 108, *any* ecclesiastical corporation, aggregate or sole (except colleges, ecclesiastical hospitals, &c.), may, with the consent of the ecclesiastical commissioners and of the patron (in the case of an incumbent) demise, by deed, the corporate lands for any term not exceeding ninety-nine years to any person willing to improve or repair the same (i).

5. *Exchanges.*—An exchange is a mutual grant of equal interests, the one in consideration of the other; and in this conveyance the word “exchange,” and no other in its stead, must be used. There was an implied warranty that if either party were evicted through defect of the other’s title, he might resume the possession of his old estate, but now by s. 4 of 8 & 9 Vict. c. 106, an exchange is not to imply any such condition or right of resumption (j). An exchange must now, by the 8 & 9 Vict. c. 106, s. 3, be by deed (k).

6. *Partitions.*—A partition is where two or more joint tenants, coparceners, or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part (l). A partition must be by deed, and is not to imply any condition in law (m).

7. *Releases.*—Release is a conveyance of an ulterior interest or right in lands or tenements to



another, that hath some former estate in possession. The words generally used therein are, "remised, released, and for ever quit-claimed." 1. Releases sometimes operate by enlargement of the estate of the releasee; as if a man seised in fee let land to another for term of years, by force whereof he is in possession, and after he release to him and his heirs all the right he has, the releasee in this case will, without any other words, have an estate in fee. 2. Releases may operate by *passing an estate*; as where one of two coparceners releaseth all her right to the other, this passeth the estate in fee simple of the whole (*n*). 3. By way of *passing a right*; as if a man be disseised, and he releases to his disseisor all his right, for by this release his estate, which before was wrongful, is now made lawful and right (*o*). 4. A release may enure by way of *extinguishment*; as if my tenant for life letteth the same land over to another for term of the life of his lessee, the remainder to another in fee; now, if I release to him to whom my tenant made a lease for term of life, I shall be barred for ever (*p*). 5. So also a release may enure by way of *entry and feoffment*; for if a disseisee release to one of two disseisors, it shall enure to hold out his companion. In the four last kinds of releases a fee will pass without words of inheritance (*q*).

8. *Confirmations*.]—A confirmation is of a nature nearly allied to a release, and is an approbation of, or assent to, an estate already created, by which the confirmer strengthens and gives validity to it as far as it is in his power; but it has this operation only with respect to estates voidable or defeasible, and not upon estates absolutely void. The words are, "ratified, approved, and confirmed." Thus, if tenant for life lease for forty years, and die during

the term, the lease is voidable by him in reversion; but if he hath confirmed the estate to the lessee for years, before the death of the tenant for life, it is no longer voidable, but sure (*r*).

9. *Surrender*.—A surrender properly is a yielding up of an estate for life or years to him that hath the immediate estate in reversion or remainder, wherein the estate for life or years may merge or drown by mutual agreement between them. A surrender immediately divests the estate out of the surrenderer, and vests it in the surrenderee. A surrender is of two sorts—viz., in *deed*, or by express words; and in *law* (*s*). But by 29 Car. 2, c. 3, s. 3, no lease or other uncertain interest shall be surrendered, unless it be by deed or note in writing, signed as the act directs. By s. 3 of 8 & 9 Vict. c. 106, a surrender, not by act of law, and not being of a copyhold interest, and not being an interest which might by law be created without writing, must be made by deed (*t*).

10. *Assignments*.—An assignment is properly a transfer or making over to another of the right any one has in any estate; but it is usually applied to an estate for years only. The assignor parts with his whole property; and the assignee stands to all intents and purposes in his place, though the original lessee still remains liable on his covenants (*u*).

11. *Defeasances*.—A defeasance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone (*v*).

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### SECT. III.—CONVEYANCES UNDER THE STATUTE OF USES.

[See 2 Black. Com. p. 327—329; 1 Steph. Com. ch. 18.]

We have now to notice those conveyances which derive their force and effect from the statute of uses, as 1, A covenant to stand seised; 2, Bargain and sale; 3, A lease and release; 4, A deed to lead or declare the uses; 5, A deed of revocation. But before we attempt an explanation of the purposes for which they were invented and are employed, it may be proper to say something of the nature of uses and trusts.

*Uses and trusts—Statute of Uses.*—Uses and trusts are, in their original nature, very similar, but not exactly the same. A right existed in the civil law of using a thing without having the ultimate property or full dominion of the substance; and the ingenuity of the ecclesiastics to avoid the effects of the statutes of mortmain, by which *lands* given to religious houses were forfeited to the Crown, after many other devices had been suppressed, transplanted into England this notion of the civil law, and with it a novel mode of conveyance, called a feoffment *to a use*; which was a method of obtaining grants of lands, not to their religious houses directly, but *to the use* of their religious houses; and the Court of Chancery, conceiving these uses binding in conscience, compelled the execution of them; thus distinguishing between the possession and the use, and receiving the actual profits, while the seisin of the land remained in the nominal feoffee. These uses, however, when thus employed to enrich the coffers of the ecclesiastics, were by 15 Rich. 2, c. 5, made subject to the statutes of mortmain; but the idea being once

introduced, it afterwards continued to be applied to a number of civil purposes, and at length grew almost universal. Great mischiefs, however, soon became apparent from this practice of permitting the land itself to be in the possession of one person, while the enjoyment or use of it was in another—for uses might be assigned by secret deeds between the parties, and might be devised; they were not held liable to any of the feudal burdens, as escheat or forfeiture; they could not be extended by elegit, or other legal process, for the debt of *cestui que use*, or him for whose use the grant was made; no wife could be endowed of such land; no husband be tenant by the curtesy. To remedy these inconveniences, several statutes were made, all tending to consider *cestui que use* as the real owner of the estate; and at length that idea was carried into full effect by the statute 27 Hen. 8, c. 10, usually called the statute of uses; by which it is enacted, “that where any person or persons stand or be seised of or in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the *use, confidence, or trust*, of any other person or persons, or of any body politic, by reason of any bargain and sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise by any manner of means whatsoever it may be, all and every such person and persons, and bodies politic, that have or shall have any such use, confidence, or trust, in fee simple, fee tail, for term of life or for years or otherwise, or any use, confidence, or trust, in remainder or reverter, shall stand and be seised, deemed and adjudged in lawful seisin, estate and possession of and the same with all their appurtenances, to all intents, constructions, and purposes in the law; and that the estate, title, right, and possession shall be clearly deemed and

adjudged to be in him or them that have or shall have such use, confidence, or trust, after such quality, manner, form, and condition, as they had before in or to the use, confidence, or trust that was in them" (w). The statute then *executes* the use, that is, conveys the possession to the use, and transfers the use to the possession, thereby making *cestui que use* complete owner of the lands, as well at law as in equity; but as the intervening estate of the *feoffee* alone is annihilated, but not the conveyance to uses abolished, the courts consider them now as merely a mode of conveyance (x). It must be borne in mind that to bring the statute into operation, it is essential that there should not only be a use, but a person *seised* to the use; for its provisions are confined to the case where "one person shall be *seised* to the use of another person." And therefore where an existing term of years is limited to a use, as where a term of 1,000 years is assigned to B. to the use of C., it has been held that the provisions of the statute do not apply to the case, and that the use will consequently remain unexecuted. For of such estates as these (being mere chattels), the termor is not *seised*, but only *possessed*, and therefore there is no person *seised* to a use as the statute requires (y). Upon the same principle of close adherence to the words of the statute, it is held that the *seisin* should be vested in a *different* person from *cestui que use* himself; for otherwise the case does not arise of one person *seised* to the use of *another*. And the *seisin* should be for an estate as extensive as the use itself; for the statute only executes the use so far as there is a corresponding *seisin* (z). So the statute does not execute a use limited on a use. Thus on a bargain and sale to B. to the use of C., the statute executes the use to B. (for it is only a use he has, as will be

hereafter shown), but not that to C., which is a trust enforceable only in equity (*a a*). So the judges have held that where a person intrusted has any active duty to perform, he cannot be considered as holding to a use, or at least not such a use as the statute executes. Thus where lands were given to B. and his heirs with a direction to receive and pay over the profits to C., this was held to be no use in C., though, on the other hand, if the direction were to permit C. to take the profits, this was considered to be a use executed in him, for here we may observe is no active duty appointed for the trustee (*a b*).

1. *Covenant to stand seized to uses.*—This is when a man who hath a wife, children, brother, or kindred, doth by bare covenant in writing under his hand and seal agree, in consideration of natural love and affection, marriage, or other *good consideration*, that he and his heirs will stand seized of land *to their use*, either in fee simple, fee tail, or for life. Before the statute of uses this would merely have raised a use in favour of such party; but now the legal estate will be transferred to him, the use being executed by the statute (*a c*). This conveyance can only be made in consideration of blood or marriage. It is almost obsolete.

2. *Bargain and sale.*—This is a real contract upon *valuable consideration* for passing manors, lands, tenements, or hereditaments; and by 27 Hen. 8, c. 16, must be by deed indented, and enrolled within six months after the date of it. It is created by the words, "have bargained and sold;" although other words, as "alien, grant, covenant to stand seized upon valuable consideration," may amount to a bargain and sale. He that sells is the

*bargainor*, and he that buys the *bargainee*. The use conveyed by this instrument must be always to the *bargainee*, upon a valuable consideration; for he cannot stand seised to the use of another (*a d*).

3. *Lease and release.*]—This is the most common kind of conveyance of any the statute of uses produced. A lease, or bargain and sale, is first executed for *a year*, upon some pecuniary consideration, by the tenant of the freehold to the lessee or bargainee, to the intent that by virtue thereof the lessee or bargainee may be in actual possession of the lands intended to be released to him; and then, by virtue of the statute, he is enabled to take a grant or release of *the reversion* of the inheritance, to the use of himself and his heirs for ever. The next day, therefore, a release is granted to him. However, a lease for years need not be executed, for by the 4 & 5 Vict. c. 21, s. 1, it is enacted that a release of a freehold estate shall be effectual, although no lease for a year shall be executed, but the stamp duty is to be paid (*a e*).

This conveyance was formerly the usual one used to pass freehold estates, and many practitioners still use, but since the 8 & 9 Vict. c. 106 (*a f*) most conveyances are made by grant, of which we have before spoken (*a g*).

4. *Deed to lead or declare the uses.*]—This was an instrument which usually accompanied a fine and recovery previously to their abolition; if made previously, it was called a deed to *lead* the uses; if subsequent, to *declare* the uses (*a h*).

*Deed of revocation of uses.*]—This instrument depends on a power previously reserved for the purpose of making it, at the time the uses are raised,

and is employed to revoke such as were then declared, and to appoint others in their stead (*a i*).

These are the several conveyances founded on the statute of uses; but before we proceed to consider alienation by record, we shall just mention some miscellaneous deeds in the nature of liabilities.

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#### SECT. IV.—OBLIGATIONS, &c.

[See 2 Black. Com. 340—342.]

*Bonds.*]—An obligation or bond is a deed containing a penalty, with a condition for payment of money, or to do or to suffer some act or thing. If it is without a condition, it is called a bill, which is sometimes with a penalty, and then it is called a penal bond. If it is without seal it is a single bill, and no deed (*a j*). If the condition of a bond be not performed, it becomes forfeited or absolute at law, and charges the obligor while living, and after his death his executors, and the liability descends upon his heir or devisee, who (on defect of personal assets) are bound to discharge it, provided they have real assets by descent or devise (*a k*). In the case of a bond, the condition of which is impossible, or is to do a thing contrary to law, or is uncertain or insensible, the condition alone is void, and the bond shall be good as a single bond; but if the condition be possible at the time of making it, and afterwards becomes impossible by the act of God, the act of law, or the act of the obligee himself, the penalty of the obligation is saved (*a l*). By 4 & 5 Anne, c. 16, although the penalty of a bond become forfeited, yet payment, or tender of payment of the principal, interest, and costs, may be pleaded in satisfaction (*a m*). By the 8 & 9 Will. 3, c. 11, the plaintiff must assign breaches, where it is not a simple money bond (*a n*).



*Recognisances.*—A recognisance is an obligation of record, which a man enters into before some court of record or magistrate duly authorised with a condition to do some particular act, as to appear at the assizes, to keep the peace, to pay a debt, or the like. There are also other recognisances, which are sometimes called statutes, because they are framed upon certain acts of Parliament, and are of two kinds:—1, *A statute-merchant*; and 2, *A statute-staple*. The first was contrived for the security of merchants only, yet was used by others, and became one of the common assurances of the kingdom. The second was invented and was used only for merchants and merchandises of the same *staple*, and was of the same nature with a statute-merchant; but they are both of them become obsolete (*a o*).

*Defeasances.*—A defeasance on a bond, on a recognisance, or on a warrant of attorney, is a condition which when performed defeats or undoes it, in the same manner as a defeasance of an estate before mentioned.

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#### SECT. V.—ALIENATION BY RECORD.

[2 Black. Com. ch. 21; 1 Steph. Com. chap. 21.]

Alienations by record are—1, Private acts of Parliament; 2, The King's grants; and, formerly, 3, Fines and common recoveries, which will be noticed in the next chapter.

*Private Acts.*—A private act of Parliament, as a mode of alienating property, is never permitted to pass without evident necessity, and upon great caution and deliberation. The necessity may arise from the intricacies into which a large family estate

may in a course of years fall, by the number of limitations it has undergone, or from other causes which make it essential to the family interest of the possessor to apply to the Legislature for powers to abridge, enlarge, and dispose of it in such a way as the exigencies of his family may require (*a p*).

*Royal grants.*]—The King's grants, or letters patent, are first prepared by the Attorney and Solicitor-general, in consequence of a warrant from the Crown, and are then signed, that is, superscribed at the top with the King's own sign manual, and sealed with the privy signet, and afterwards pass under the great seal (*a q*).

## CHAP. XXVII.

ALIENATION BY TENANTS IN TAIL AND  
MARRIED WOMEN.

[See 2 Black. Com. 348—364; 1 Steph. Com. chap. 19.]

In the previous chapter we mentioned that fines and recoveries were formerly conveyances of record, and we may now state that they were so until the 3 & 4 Will. 4, c. 74, abolished them, and substituted in their place more simple modes of assurance. They were chiefly in use for the barring of entails, and the conveyance by married women of their real estate, and we have therefore thought it appropriate to notice fines and recoveries in a chapter treating of alienation by tenants in tail and married women. A short sketch of fines and recoveries is indispensable, as the student will continually meet with them in his reading, and it is very necessary that a proper notion of them should be obtained. That portion of Blackstone's Commentaries (vol. i. p. 348—364) which treats of fines and recoveries should be carefully studied.

*Fines.*—A fine was an amicable agreement or composition of a supposed suit, by which lands and

tenements were transferred from one person to another, or any other settlement was made relating to lands and tenements. It was called a *fine*, because it put an end not only to the suit thus commenced, but also to all other suits and controversies concerning the same matters. A fine consisted of five parts:—1. The original writ, the foundation of the action being a supposed agreement or covenant, that the vendor should convey the lands to the purchaser, on the breach of which agreement the action was brought. 2. The *licentia concordandi*, or leave to agree the suit, which was granted on payment of a fine called the King's silver. 3. The concord or agreement entered into openly in the Court of Common Pleas, or before one of the justices of that court, or commissioners in the country duly authorised for that purpose, which was the foundation and substance of the fine. It was usually an acknowledgment from the deforcants, or those who kept the others out of possession, that the lands in question were the right of the demandant, and from the acknowledgment or recognition of right thus made, the party who levied the fine was called the cognizor, and the person to whom it is levied the cognizee. 4. The note of the fine, which was only an abstract of the writ of covenant and the concord. 5. The foot, chirograph, or indenture of the fine; which recited the whole matter. Of this there were indentures made or engrossed at the chirographer's office, reciting the whole proceedings at length; the fine was thus completely levied at common law. But when fines became a more general mode of assurance, it became necessary to render the levying of them a matter of the most public notoriety, on account of those whose rights might be barred by not making their claim in due time. For this purpose it was

enacted by several statutes that the fine, after engrossment, should be openly read and proclaimed in court once in each term, and these proclamations were endorsed on the back of the record; other provisions for greater publicity were enacted by 23 Eliz. c. 3. Hence it is that a difference is often taken between a fine at common law and one with proclamations (a).

Fines were divided into four sorts:—1. Fines *sur cognizance de droit come ceo*, which was the best and surest kind of fine; for the deforçant acknowledged in court a former feoffment, or gift in possession, to have been made by him to the plaintiff, so that it was rather an acknowledgment of a former conveyance, than a conveyance originally made, for the deforçant acknowledged the right to be in the plaintiff or cognizée, as that which he had *de son done* of the proper gift of himself the cognizor. This species of fine gave the cognizée immediate possession of the land. 2. Fine *sur cognizance de droit tantum*, or upon acknowledgment of the right only, without the circumstance of a preceding gift of the cognizor. This species of fine was generally used to pass a reversionary interest. This fine might also be used by tenant for life, in order to make a surrender of his life estate to the person in remainder or reversion; and then it was called a fine upon surrender. 3. A fine *sur concessit* was where the cognizor, in order to make an end of disputes, though he acknowledged no precedent right or gift, granted to the cognizée an estate *de novo*, by way of supposed composition, which might be either an estate in fee, in tail, for life, or even for years. 4. A fine *sur done et render* was a double fine, comprehending the fine *sur cognizance de droit come ceo*, and the fine *sur concessit*. It was used in order to create particular limitations of estates.

The persons bound by a fine were *parties*, *privies*, and *strangers*. Parties were either the cognizors or cognizees; and these were immediately concluded by the fine, and barred of any latent right they might have, though even under the legal impediment of coverture. Indeed, married women were required to be privately examined apart by one of the judges. Privies to a fine were such as were any way related to the parties who levied the fine, and claimed under them by any right of blood, or other right of representation; such were the heirs general of the cognizor, the issue in tail since the 11 Hen. 7, c. 20, the vendee, the devisee, and all others who must have made title by the persons who levied the fine. Strangers to a fine were all other persons in the world except parties and privies; and these also were bound by a fine, unless within five years after proclamations made they interposed their claim; provided they had then a present interest in the estate, and were not under the impediments of either coverture, infancy, imprisonment, insanity, or absence beyond sea; for persons thus incapacitated to prosecute their rights had five years allowed them to put in their claims, after such impediments were removed (*b*).

[*Recoveries*.]—A common recovery was another species of assurance by matter of record, and was described to be a judgment obtained in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who was last vouched to warranty in such suit: and these judgments bound the right of the land so recovered, and vested a free and absolute estate in fee simple in the recoverors. The first thing requisite was that the person who was to be the demandant, and to whom the lands were to be conveyed, should

sue out a writ or *præcipe* against the tenant of the freehold; whence such tenant is usually called the *tenant to the præcipe*. In obedience to this writ, the tenant to the freehold appeared in court; but instead of defending the title of the land himself, he called on some other person, who, upon the original purchase, was supposed to have warranted the title, and prayed that such person might be called in, to defend the title which he had warranted; or otherwise to give the tenant lands of equal value to those which he would lose by the defect of his warranty. This was called "the voucher," *vocatio*, or calling to warranty. The person thus called to warrant the title (who was usually called *the vouchee*), appeared in court, was impleaded, and entered into the warranty, by which means he took upon himself the defence of the land. The demandant then desired leave of the court to imparl or confer with the vouchee in private, which was granted of course. Soon afterwards the demandant returned into court but the vouchee disappeared or made default; in consequence of which it was presumed by the court, that he had no title to the lands demanded by the writ, and therefore could not defend them; whereupon judgment was given for the demandant, now called *the recoveror*, to recover the lands in question against the tenant; and judgment was also given for the tenant to recover against the vouchee lands of equal value, in recompense for the lands so warranted by him, and now lost by his default. This was called *the recompense*, or recovery in value; but as it was customary to vouch the cryer of the Court of Common Pleas, who was hence called *the common vouchee*, the tenant could only have a nominal recompense for the lands thus recovered against him by the demandant. A writ of *habere facias*

*seisinam* was then sued out, directed to the sheriff of the county in which the lands, thus recovered, were situate; and on the execution and return of this writ, the recovery was completed. The recovery here described was with single voucher; but a recovery might be and frequently was suffered with double voucher, or farther voucher, as the exigency of the case might require. In a recovery with double voucher, the tenant or proprietor of the land conveyed an estate of freehold to some indifferent person against whom the writ was brought; the tenant to the *præcipe* then vouched the proprietor of the land, who vouched over the common vouchee. In every common recovery the demandant acquired the fee simple of the lands recovered, although the word *heirs* were not mentioned in the judgment; because, the writ being brought for the absolute property or fee simple of the land, if judgment was obtained, it must be for as much as was demanded in the writ, and in all adversary suits, every recoveror recovered a fee simple. A common recovery was an absolute bar, not only of all estates tail, but of remainders and reversions expectant thereon. But by 34 & 35 Hen. 8, c. 20, no recovery had against tenant in tail of the King's gift, whereof the remainder or reversion was in the King, should bar such estate tail, or the remainder or reversion of the Crown. And by 11 Hen. 7, c. 20, no woman, after her husband's death, could suffer a recovery of lands settled on her by her husband; or settled on her husband and her by any of his ancestors. Also, by the 14 Eliz. c. 8, no tenant for life, of any sort, could suffer a recovery so as to bind them in remainder or reversion. It was a forfeiture of his estate, and consequently destroyed all contingent remainders expectant thereon (c).



*Alienations by tenants in tail.*]—As before stated, fines and recoveries are abolished by the 3 & 4 Will. 4, c. 74, which substitutes more simple modes of assurance in their places so far as regards tenants in tail and married women. As to dispositions by tenants in tail, the assurance, which must be enrolled in Chancery within six calendar months from its execution (s. 41), may be by feoffment, lease and release, bargain and sale, grant or covenant to stand seised, according to the circumstances of the estate, and the object of the parties, but not by executory contract or will (ss. 15, 40). The estate tail may be barred whether legal or equitable, in possession, remainder, or contingency (s. 15.); and the conveyance may be either with or without the consent of the person called by the act “the protector;” but where there is a protector, his consenting or not will materially affect the operation of the deed of disposition as it regards the remainders expectant upon the estate tail, in reference to which his concurrence is required. As to the “protector” just mentioned, his office is to consent and not to convey. Where the settlement does not appoint any protector, the first tenant for life or years determinable on life, will, in general, be the protector; and that, notwithstanding the partial or total alienation of his estate (s. 22); but subject to the exceptions in ss. 29 and 30.

Let us now see what it is that the tenant in tail may accomplish by the act. If he be tenant in tail in possession, he may by deed in conformity with the act convey away the fee simple absolute, or any less estate (ss. 15, 21), or otherwise modify or dispose of the estate in the same manner as if he were seised in fee (s. 40), except such tenant in tail were a woman seised *ex provisione viri*, under 11 Hen. 7, c. 20, by virtue of a settlement made

before the passing of the act (ss. 16, 17); and except as to reversions in the Crown, under 34 & 35 Hen. 8, c. 20, s. 18, by virtue of a settlement made before the passing of the act (ss. 16, 17); and except as to reversions in the Crown, under 34 & 35 Hen. 8, c. 20 (s. 18). A tenant in tail with remainder over where there is a protector cannot bar the remainders expectant upon his estate tail, without the consent of such protector. Such protector may concur either in the deed of disposition, or by a separate deed (s. 42); but without such consent, the tenant in tail may acquire or convey a base fee co-extensive with the continuance of issue under the entail, thereby barring such issue; as before the act he might have done by a fine with proclamations. If the estate tail be in remainder, the person entitled may, with the concurrence of the protector, bar all remainders and other estates and interests expectant upon his own estate tail; but, of course, leaving unaffected estates prior thereto.

The act applies to copyholds, but a disposition of them by tenant in tail, if entitled at law, must be by surrender; if entitled only in equity, then either by surrender or deed (s. 50—54). By sect. 71, the previous powers of disposition are, with certain variations, extended to those who may be considered *quasi* tenants in tail of money to be produced by sale of lands of any tenure directed to be sold, or to be reinvested in land, or of money to be laid out in the purchase of lands (z).

*Alienations by married women.*—As to married women, sect. 77 of the act enables her with the consent of her husband to dispose by deed of lands, or money subject to be invested in the purchase of lands, and to release any estate which she alone, or

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which she and her husband in her right, may have therein; and also to release or extinguish any power reserved to her as fully as she could do if she were a feme sole. By sect. 7 of 8 & 9 Vict. c. 106, a married woman is enabled to disclaim by deed an estate or interest in any lands of any tenure. However, every deed of disposition by a married woman must be acknowledged (s. 79) by her before a judge, Master in Chancery, or before commissioners; and she must be separately examined. In certain cases the court may dispense with the concurrence of the husband (*aa*). The concurrence of the husband and acknowledgment are, by sect. 40, required where the tenant in tail is a married woman.

## CHAP. XXVIII.

## DEVISE.

[See 2 Black. Com. ch. 23; 1 Steph. Com. ch. 20.]

Devise is the last method of conveying real property which we shall have occasion to notice. A devise is a bequeathing of lands or tenements *by will* in writing; for of a legacy, or disposal of personal property *by testament*, we shall speak hereafter. A will devising lands is considered in law as an instrument declaring the uses to which the lands shall be subject. By the common law (except by custom) (*a*), no lands in fee simple were devisable by will, nor could they be transferred from one to another, except by the solemnity of livery of seisin, matter of record, or sufficient writing. But by 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 6, all persons having a sole estate, or interest in fee simple, or in coparcenary, or in common, either in possession, remainder, or reversion, or of any rents or services incident thereto, except feme covert, infants, idiots, and persons of *non sane* memory, have full and free liberty to give,

dispose, will, or devise to any person or persons (except bodies politic or corporate), by last will and testament in writing, or otherwise by any act lawfully executed in his lifetime, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage. So that now, as all tenures are converted by 12 Car. 2. c. 24, into free and common socage, a man may devise his fee simple lands, either in fee simple, fee tail, for life, or years, absolutely or conditionally, at his pleasure, without livery of seisin, or naming an executor. But copyhold lands could not be devised unless by custom, or being surrendered to the use of the owner's will. But by 55 Geo. 3. c. 92, the surrender was dispensed with (*b*). Estates *pur autre vie* were devisable by 29 Car. 2, c. 3, s. 12. The statutes of Henry VIII., having only appointed that these devises should be in writing, without marking out any form or ceremony under which it was to be performed, many frauds and perjuries were committed, to introduce mere notes of hand and other writings as bad wills. To remedy this inconvenience, the 29 Car. 2, c. 3, directs that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction, and be subscribed in his presence by three or four credible witnesses: and a similar solemnity is requisite for revoking a devise (*c*).

As to wills made on or after the 1st day of January, 1838, the new Wills Act, 7 Will. 4, and 1 Vict. c. 26, has repealed the former enactments, making in lieu thereof new and more ample provisions. As to the subject matter of the devise, that statute enacts, that it shall be lawful for all persons (except infants under twenty-one and married women) to dispose by will of all their real

(including copyholds) and personal estate, either at law or in equity, to which they shall be entitled at the time of their deaths, and which, but for such disposition, would pass to the heir at law or to the personal representative; and it expressly extends the same power to all their estates *pur autre vie*, and to all their contingent, executory, or other future interests, and even their rights of entry upon land; which latter subject was previously considered as incapable of being devised. The power is also expressly extended to after-acquired lands, by a provision that all real and personal estate to which the testator is entitled at the time of his death, shall pass, notwithstanding that he may become entitled to the same subsequently to the execution of his will (*d*). Under this act a corporation may, subject to the Mortmain Act (p. 112), be a devisee (*e*).

As to the *formalities attending the execution* of a will made on or after the 1st January, 1838, the former provisions as to execution and attestation are repealed; and it is enacted that no will (with the exception of those made as to personal estate by soldiers and seamen in certain cases (*f*), as provided for by former statutes) shall be valid, unless it shall be in writing, and signed at the foot or end thereof by the testator, or some other person in his presence and by his direction; such signature being also made or acknowledged by him in the presence of two or more witnesses present at the same time, and such witnesses attesting and subscribing the will in his presence. Where these requisites, however, are complied with no other is now imposed by law; and the statute expressly enacts that no publication other than is implied in the execution so attested shall in future be necessary. In case of incompetency of any attesting witness, the will shall not on that account

be invalid. Any beneficial gift or appointment by the will to an attesting witness, or to the husband or wife of an attesting witness (except a charge for payment of debts) shall be void, and the evidence of the witness admissible. Where land is charged by the will with payment of debts, and the creditor, or husband or wife of the creditor, is an attesting witness, such witness shall nevertheless be competent. And no person shall be incompetent on account of his being an executor of the will (g).

As to the *revocation* of a will the former law is altered; and it is provided by the new act that every will taking effect thereunder shall be revoked by the marriage alone of the testator or testatrix, unless such will was made in exercise of a power of appointment, and in a case where the estate would not have passed, in default of appointment, to his or her representatives; but that, on the other hand, no will "shall be revoked by any presumption of an intention on the ground of an alteration in circumstances," nor in any other manner, except by marriage as aforesaid or by another will or codicil or some writing of revocation executed like a will, or by burning, tearing, or otherwise destroying it (*animo revocandi*) by the testator, or some person in his presence and by his direction, and that, except such acts as these, no act whatever subsequent to its execution shall prevent its taking effect on any estate which the testator shall have power to dispose of at his death. With respect to obliteration, or rather alteration, made after execution, it is in like manner provided that they are to have no effect (where the original meaning can still be deciphered), unless executed with the same ceremonies as the will itself; though it will be sufficient if the signature of the testator and the subscription of the witnesses be made opposite or near the part altered, or at the foot or end

of some memorandum written on the will and referring to the alteration. And so, when a will is once revoked, it is not to be revived otherwise than by re-execution of the original, or by a codicil duly executed and showing an intention of revival (h).



## CHAP. XXIX.

## COPYHOLDS.

[See 2 Black. Com. pp. 90—101; 2 Steph. Com. Bk. II., pt. 1, chap. 28.]

Having now noticed the different kinds of estates in freeholds, and the methods of acquiring titles thereto, it is proper to notice one kind of property of a different tenure, namely, copyholds, which we have reserved for separate consideration not only on account of its different tenure, but also by reason of its peculiar customs and methods of alienation. Copyholds sprang from the tenure of villenage; the services of which, in respect of their qualities, were either free or base, and in respect of their quantity and the time of exacting them were either certain or uncertain. Copyholds are to be found in manors only, and they must have existed immemorially, or at least prior to the 18 Edw. I., statute of *Quia Emptores*, which forbade subinfeudations, and consequently no copyhold can now be created. The copyholder is said to hold at the will of the lord, according to the custom (*a*), and he may have an estate in fee, or by custom only, in tail, or for life or years; but the freehold, as a tenure, is in the lord (*b*).

A copyholder must not commit waste, nor can he grant a lease for more than one year without license

(c). He is subject to the payment of quit rents, fines, and heriots—of these last we have before spoken. Fines are due by the custom of most manors to the lord, upon every descent or alienation of his copyhold; and they accrue by force of the admittance. These fines are either certain or arbitrary, but even the latter cannot exceed two years improved value of the land (*d*).

Formerly copyholds were not assets in the hands of the heir or devisee, and were consequently exempt after the tenant's death from the claims of his creditors; nor could any part be taken on an *elegit*. But now, by 3 & 4 Will. 4, c. 104, they are (like freeholds and customary holds) assets in *equity* for payment of the debts of the deceased owner, whether by simple contract or specialty, with a preference to specialties in which the heir is bound. And by 1 & 2 Vict. c. 110, s. 11, on an *elegit* the whole of the defendant's copyholds may be extended, and by sect. 13, a judgment duly registered is a charge on copyholds (*e*).

Copyholds may be enfranchised, that is, converted into freehold tenure, either by a conveyance to the tenant of the lord's freehold, or by a release from the lord to the tenant of the seignorial rights. Besides these methods of enfranchisement there is a statutory one (4 & 5 Vict. c. 35, extended by 6 & 7 Vict. c. , and 7 & 8 Vict. c. 55), though not compulsory, as it only facilitates *voluntary* enfranchisements, and gives effect to agreements for commutation of manorial burthens and restrictions (*f*).

As to devises of copyholds, we have before stated the old law, and that by the new Wills Act copyholds may be devised though there be no surrender to the use of the will, and though the party have not been admitted (*g*).

*Conveyance of copyholds.*]—The alienation of copyhold lands, and such customary estates as are holden in *ancient demesne* (which is derived from privileged villenage, as copyholds were from pure villenage) is by a surrender. A surrender is the yielding up of the land by the tenant to the lord, according to the custom of the manor, to the use of him that is to have the estate; but until the presentment and admittance of the *cestui que use*, the lord taketh notice of the surrenderor as his tenant. Presentment, which is an information to acquaint the lord or his steward with the surrender that has been made, is to be made at the next court-baron immediately after the surrender; but by special custom in some places, it will be good though made at the second or other subsequent court. It is to be brought into court by the same persons who took the surrender, and then presented by the homage (*h*). Admittance is the last stage or perfection of copyhold assurances, and it is the giving possession of the estate in the same manner as induction gives possession of a benefice. Admittances are of three kinds:—1. An admittance upon a voluntary grant from the lord; for if a copyhold for life fall into the lord's hands by the tenant's death, though the lord may destroy the tenure and enfranchise the land, yet if he still continue to dispose of it as copyhold, he is bound to observe the ancient custom in every point, and can neither add to nor diminish the ancient rent, nor make any the minutest variations in other respects. 2. An admittance upon surrender of a former tenant; for in this case the lord is the instrument of the law, and no manner of interest passes to him by the surrender; and of course none can pass out of him by the admittance. The admittance of the surrenderee is a mere ministerial act, which every lord in possession is bound to per-

form. 3. An admittance upon a descent from the ancestor, which only differs from an admittance upon surrender, inasmuch as in the first case the heir is tenant by copy immediately upon the death of his ancestor, but in the second nothing is vested in the *cestui que use* before admittance (i).

By the 1 Will. 4, c. 65, infants, femmes covert, and lunatics, in their proper persons, or being infants by guardians, femmes covert by attorney, or lunatics by committee, may be admitted to copyholds (k).

An estate tail cannot exist in copyholds except by custom; it is barrable by surrender duly entered on the court rolls, the consent of the protector, where there is one, being also given.

Where the interests of parties in copyholds are *equitable* only, they are not passed by surrender, but by an ordinary conveyance, or by any instrument in writing duly signed. As to equitable estates tail, and the equitable estates of married women not tenants in tail, they pass by surrender or deed.

## CHAP. XXX.

## PERSONAL PROPERTY.

[See 2 Black. Com. chaps. 24—30; 2 Steph. Com. Bk. II., pt. 2, chaps. 1—7.]

We have in the preceding chapters considered the nature of real property and its transmission, and we have now to notice the subject of property in things personal, or personalty.

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 SECT. I.—THINGS PERSONAL IN GENERAL.

[See 2 Black. Com. chap. 24, 25; 2 Steph. Com. Bk. II., pt. 2, chap. 1.]

Things personal comprise all sorts of things moveable, which may attend a man's person wherever he goes, which are usually termed *goods*; and something more, the whole of which is comprehended under the general name *chattels*. Chattels may be either real or personal. Chattels real are those which concern the realty, or lands and tenements; as term for years of land, the next presentation to a church, estates by statute-merchant, statute-staple, *elegit*, or the like. Chattels personal are, properly and strictly speaking, things moveable, as gold, silver, plate,

jewels, implements of household, cattle of all sorts, and the like. The ownership of a chattel is called property; and as persons are said to be seised of land, so they are said to be possessed of chattels, whether they be real or personal (*a*). The possession of this species of property is either absolute or qualified. Absolute possession is, when a man hath, solely and exclusively, the right and also the occupation of any moveable chattels, so that they cannot be transferred from him, or cease to be his, without his own act or default; such as may be all inanimate things, as plate, money, &c., or all vegetable productions, as fruits, plants, &c. But with respect to animals, which have in themselves a principle and power of motion, an absolute possession cannot be gained unless they are domesticated and rendered so tame that he may have them perpetually in his occupation, as horses, sheep, poultry, and the like: but in animals *feræ naturæ* no absolute property can be gained, unless they are reclaimed and rendered valuable to the use of man. A qualified property, therefore, subsists in all wild animals:—1. *Per industriam hominis*, by a man's reclaiming and making them tame by art, industry, and education, or by so confining them within his own immediate power that they cannot escape and use their natural liberty. 2. *Ratione impotentiae*, on account of their own inability, as when hawks, herons, or other birds, build in my trees, or conies, or other creatures, make burrows in my land. 3. *Propter privilegium*—as by being lawfully qualified to hunt, and having an exclusive authority to take or kill them (*b*). But personal property, as well as being thus in the actual or constructive possession of a man, may also be of a qualified or special nature, as in the case of bailment, or of the delivery of goods to another to a particular use; as to a carrier to convey to any place,

here there is no absolute property in either the bailor or the bailee; for the bailor hath only the right, and not the immediate possession; and the bailee hath possession, and only a temporary right: but it is a qualified property in them both, and each of them is entitled to an action against a stranger in case the goods be damaged or taken away by him (*c*). Personal property may also be in what the law calls *action*, or such where a man hath not the enjoyment (actual or constructive) but merely a bare right to recover the thing in question by a suit at law; and for this reason it is called a *chose in action*; as money due on a bond, damages for non-performance of a covenant or promise; the former depending on an *express contract* or obligation to pay a stated sum, and the second on an *implied contract*, that if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant. So the term *chose in action* extends to the right to recover damages for a wrong, independently of any contract between the parties (*d*). And all these things, whether in possession or action, a man may have either in his own right or in the right of others, as executor, administrator, trustee, &c.; so also he may have them in expectancy, for they may be limited to him by way of remainder (*e*). They may also belong to their owners not only in severalty, but also in joint-tenancy and in common, as well as real estates.

Personal property may be lost and gained in twelve different ways, viz.—1, by occupancy; 2, prerogative; 3, forfeiture; 4, custom; 5, succession; 6, marriage; 7, judgment; 8, gift or grant; 9, contract; 10, bankruptcy; 11, testament; and 12, administration; the first nine of which will be disposed of in this chapter, and the remaining three in the two following chapters.

## SECT. II.—OCCUPANCY.

[See 2 Black. Com. chap. 26; 2 Steph. Com. Bk. II. pt. 2, ch. 2.]

Occupancy was the original and only primitive mode of acquiring any property at all, but this has been abridged and restrained by the positive laws of society, in order to maintain peace and harmony among mankind; and the only instances wherein this right still subsists are the following:—1. The goods of an alien enemy brought into the country after a declaration of war, without a passport, may be seized by such persons as are authorised by the King (*e*). So also, whatever goods are found on the surface of the earth, abandoned by the proprietor, may be appropriated by the first finder of them. So also, the elements of air, water, light, can only be appropriated by occupancy; for one man cannot obstruct another's light, nor, by erecting a mill, so obstruct a stream of water as to injure those who had obtained a prior occupation of it. So also with regard to animals *feræ naturæ*, any man may take them, unless where it is restrained by the civil laws of the country.

*Copyright.*] — In this place may likewise be noticed the right of literary property, which right, by the statute 8 Anne, c. 10, was appropriated to authors and their assigns for the term of fourteen years; but now by the 5 & 6 Vict. c. 45, it is enacted that the copyright of every book (which includes “every volume, part, or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan, separately published”), which shall be published in the life-time of its author, shall endure for his natural life, and for seven years longer; or if the seven years shall expire before the end of forty-two years from the



first publication shall endure for such period of forty-two years, and that when the work is posthumous, the copyright shall endure for forty-two years from the first publication, and shall belong to the proprietor of the author's manuscript (*f*). The statute also authorises, in every case of copyright, the registration of the title of the proprietor at Stationers' Hall, and provides, that without previous registration no action at law, suit in equity, or summary proceeding in respect of any infringement of such copyright, shall be commenced, though an omission to register is not otherwise to affect the copyright itself (*g*).

By the 7 & 8 Vict. c. 12, the Queen by order in council may direct that authors, &c., of works first published in foreign countries shall have a copyright therein within her Majesty's dominions (*h*).

A species of copyright may exist in other productions of genius. For by 8 Geo. 2, c. 13, 7 Geo. 3, c. 38, 17 Geo. 3, c. 57, an exclusive privilege of the same description (in general) may be claimed by the inventor in engravings and prints; by 38 Geo. 3, c. 71, and 54 Geo. 3, c. 56, in sculptures, models, copies, and casts; and by 5 & 6 Vict. c. 100, in designs for ornamental manufactures or other substances (see 7 & Vict. c. 12, s. 2, as to foreigners).

*Patents for inventions*].—Here may be noticed the subject of patents for inventions, which are excepted from the operation of the statute against monopolies (21 Jas. 1, c. 3, s. 1), in the following words: all letters patent for the term of *fourteen* years or under, by which the privilege of sole working or making any *new* manufactures *within this realm*, which others at the time of granting the letters patent shall not use, shall be granted to the

true and first inventor thereof; so as they be not contrary to law, nor mischievous to the State, nor to the hurt of trade, nor generally inconvenient. Other statutes have been made to regulate and secure patent rights and their renewal, &c. (i).

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### SECT. III.—PREROGATIVE.

[See 2 Black. Com. chap. 27.]

Prerogative, whereby a right may accrue either to the Crown itself, or its grantees, is a second method of acquiring personal property; as in wreck, treasure-trove, waifs, estrays, royal fish, swans, and the like. The King also has the right of printing at his own press, or that of his grantees, all acts of Parliament, proclamations, and orders of council; but he has not the exclusive right of printing almanacks, as has been heretofore conceived (j). The right of pursuing, taking, and destroying beasts *feræ naturæ*, is vested in the King; and in all cases of property, where the titles of a King and subject concur, as if a horse be given to the King and a private subject, the King shall have the whole.

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### SECT. IV.—FORFEITURE.

[See 2 Black. Com. chap. 27; 4 Steph. Com. Bk. IV. chap. 23.]

Forfeiture is also a method by which a title to goods and chattels may be acquired and lost. At the common law goods and chattels are forfeited by conviction in all felonies, high-treason inclusive; and also in the several misdemeanors of, 1, drawing a weapon on a judge; 2, striking in the King's courts; and 3, *præmunire* (k).

## SECT. V.—CUSTOM.

[See 2 Black. Com. chap. 28; 2 Steph. Com. 48—50; 3 *Id.* 147—149; 2 *Id.* 265, 266.]

Custom is a fourth method of acquiring property in things personal, whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom; as for instance, in the acquisition of heriots, mortuaries, and heir-looms. 1. Heriot is a render made at the death of the tenant to the lord, of the best beast or other thing, and consists in either heriot-service or heriot-custom; the first of which is never due without being specially reserved in the grant; but the second, being due by custom, may be seized without any reservation, although it cannot be distrained (*b*). 2. Mortuaries are a sort of ecclesiastical heriot, being a customary gift claimed by and due to the minister in very many parishes on the death of his parishioners. By 21 Hen. 8, c. 6, the value of those mortuaries due by custom are fixed and settled in proportion to the value of the personal property the parishioner dies possessed of. Also, by the 12 Anne, c. 6, and 28 Geo. 2, c. 6, the mortuaries due to Welsh bishops are abolished, and a pecuniary equivalent settled on the bishop in its room. 3. Heir-looms are such goods and personal chattels as go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor; and generally, though not always, consist of such things as cannot be taken away without damaging or dismembering the freehold. The ancient jewels of the Crown are heir-looms. Charters, deeds, court-rolls, and other evidences of land, together with the chests in which they are contained, are in the nature of heir-looms;

and many other articles of the like kind. Limitations in the nature of heir-looms are sometimes made in wills, &c., but they are effectual only till some person takes a vested interest (*m*).

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## SECT. VI.—SUCCESSION.

[See 2 Black. Com. chap. 29.]

Succession is a fifth method of gaining a property in chattels, either real or personal: and is, strictly speaking, applicable only to corporations aggregate; for a gift to such a corporation, either of lands or of chattels, without naming their successors, vests an absolute property in them so long as the corporation subsists. In the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession; but where such corporation represents many, as the Chamberlain of London, chattels given to him alone shall go to his successors (*n*).

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## SECT. VII.—MARRIAGE.

[See 2 Black. Com. chap. 29; 2 Steph. Com. p. 299—302.]

Marriage is a sixth method of acquiring property in goods and chattels; for marriage is a gift in law of all the wife's property to her husband:—1. Of her chattels personal in possession absolutely. 2. Of her choses in action, from the time the husband reduces them into possession. 3. Of the rents and profits of her real property during the coverture. Thus all the personal estate of a woman, as money, goods, cattle, household furniture, and the like, that were in her possession at the time of the marriage, are absolutely vested in the husband; so that of these he may make any disposition in his

life-time without her consent, or may by will devise them; and if he die intestate, they shall go to his personal representative, and not to the wife, though she survive him; but she must be possessed of these goods in her own right, and not as executrix or bailee; for chattels personal which she has *in autre droit*, shall not go to the husband. Chattels personal *in action* only, as debts upon bond, contracts, and the like, vest only in the husband by his recovering them at law, for upon such recovery they are absolutely and entirely his own; but if he die before he thus recovers the possession, they shall survive to the wife (*o*). Chattels real also vest in the husband, not absolutely, but *sub modo* only; as in case of a lease for years, the husband shall receive all the rents and profits of it, and may if he pleases sell, surrender, or dispose of it during the coverture, and if he survives his wife, it shall be absolutely his own; but if he make no disposition thereof in his life-time, and die before his wife, it cannot be disposed of by his will (*p*).

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#### SECT. VIII.—JUDGMENT.

[See 2 Black. Com. chap. 29.]

Judgment obtained in consequence of some suit or action at law is also a means of acquiring personal property; that is, it enables the party by an execution to recover the money or thing claimed, or its equivalent.

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#### SECT. IX.—GIFTS AND ASSIGNMENTS.

[See 2 Black. Com. chap. 36; 2 Steph. Com. Bk. II., pt. 2, chap. 4.]

Gifts or assignments are the eighth method of

transferring personal property. Gifts are always gratuitous; grants or assignments are always upon consideration or equivalent. By 3 Hen. 7, c. 4, all deeds of gift of goods, made in trust to the use of the donor, shall be void; and by 18 Eliz. c. 5, every grant or gift of chattels, as well as lands, with intent to defraud creditors or others, shall be void as against such persons to whom such fraud would be prejudicial, but as against the grantor himself shall stand good and effectual (*q*). The true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately, for if it does not, it is rather a contract than a gift, and cannot be good for want of consideration, except, of course, it be by *deed*. A general gift of all a man's goods without exception, or if the exception be colourable only, is presumed to be fraudulent; and in the case of a trader, if the portion of goods granted be so great as to disable him to continue his trade, it is not only void, but an act of bankruptcy (*r*).

There is a particular gift which does not take effect till after, and only in the event of the death of the donor. This is called a *donatio mortis causâ*. There must be an actual delivery of the chattel or other property, and the party must be in apprehension of death (*s*).

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#### SECT. X.—CONTRACTS.

[See 2 Black. Com. chap. 30; 2 Steph. Com. Bk. II., pt. 2, chap. 5.]

A contract is an agreement, upon consideration, to do or not to do a particular thing. We are speaking now of agreements *not* under seal, which are called *parol* contracts. The agreement which arises from a mutual bargain made between at least two persons, who are by law capable of contracting,

may be either express or implied. Express contracts are where the terms of the agreement are openly uttered and avowed at the time of the making; as, to deliver an ox or other goods, to pay a stated price for them, and the like. Implied contracts are such as the law presumes every man intends and undertakes to perform; as if a person usually send his servant to market, the law raises an implied contract between the vendor and the master; so also there is one species of implied contracts which runs through and is annexed to all other contracts and agreements, that if one of the parties fail in his part, he shall pay to the other such damages as he has sustained by the non-performance. A contract also may be either *executed*; as if A. agrees to change horses with B. and they do it immediately, here the possession and the right are transferred together: or it may be *executory*; as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession, but *in action*. It follows, therefore, that as a contract executed conveys a chose in possession, a man cannot grant or convey by it anything in which he has not an actual or potential interest at the time of the conveyance: but that in executory contracts, which convey only a chose in action, a man may convey that of which at the time he is not actually possessed (*t*). A contract, however, cannot be good, unless it be made upon sufficient consideration, which is defined to be, that in expectation of which each party was induced to make the agreement. A consideration of some sort or other is so absolutely necessary to the performing of a parol contract, that an agreement to do or pay anything on one side, without any consideration on the other, is *nudum pactum*, and totally void in law; for, *Ex nudo pacta*

*non oritur actio*. But any degree of reciprocity will prevent the pact from being nude; and, therefore, if the consideration be in any degree for the benefit of the defendant, or to the trouble or prejudice of the plaintiff, an action of assumpsit will lie; nay, even if the contract be founded on a prior moral obligation, enforceable originally at law (as a promise to pay a just debt, though barred by the statute of limitations), it is no longer *nudum pactum* (*u*). But by 29 Car. 2, c. 3, no verbal promise shall be sufficient to ground an action upon, where an executor or administrator contracts to answer damages out of his own estate; where a man undertakes to answer for (or guarantee) the debt, default, or miscarriage of another; where an agreement is made upon consideration of marriage; where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein; or where there is any agreement not to be performed within a year from the making thereof, unless some note or memorandum of it shall be made in writing, and signed by the party to be charged therewith, or by his agent (*v*). So by 6 Geo. 4, c. 16, s. 131, a written promise by a bankrupt to pay a debt, after certificate, is necessary (*w*). So by 9 Geo. 4, c. 14, to confirm a debt contracted during infancy, or to revive a debt barred by the statute of limitations (*x*).

The most usual contracts whereby the right of chattels personal may be acquired are by sale or exchange, by bailment, by hiring or borrowing, and by debt.

*Sales of goods.*]—A sale is a transmutation of property from one man to another, in consideration of some price or recompence; as an exchange is a commutation of goods for goods. A man may sell



or exchange his goods in any manner, at any time, and to any person he pleases, unless judgment has been obtained against him, and the writ of execution is actually delivered to the sheriff. On an agreement for goods, the vendee cannot carry them away unless the vendor agree to trust him; for it is no sale without payment. But if any part of the price be paid down, or any portion of the goods delivered by way of earnest, the vendee may recover the goods by action, as well as the vendor may the price of them. But by 29 Car. 2, c. 3, no contract for the sale of goods (though to be delivered at a future time, 9 Geo. 4, c. 14, s. 7) to the value of ten pounds or upwards shall be valid, unless this payment or delivery be performed, or unless some note in writing be made and signed by the party or his agent, who is to be charged with the contract (*w*). But if a vendee, after the bargain is struck, tender the money, and the vendor refuses it, the property is absolutely vested in the vendee. A contract also by sale may be good, although the vendor hath no property in the goods sold at the time of the sale; for the buyer, by taking proper precautions, may at all events be secure of his purchase (*x*). Where goods are sold in market-overt, the contract is binding, not only between the parties, but on those to whom the property may in truth belong; as if a man steal goods, although the owner may at any time seize them, yet if the thief sell them in market-overt, the property is changed by the sale (*y*); though still restitution may be had on prosecuting the thief to conviction. Market-overt, in the country, is only on stated days; but in London, every day, except Sunday, is an open market for such things as the owner of the open shop professes to trade in. By 1 Jac. 1, c. 21, if stolen property be taken to any pawnbroker in

London, or within two miles, he shall restore it to the owner. And by 39 & 40 Geo. 3, c. 99, search may be made by a justice at a pawnbroker's for unlawfully pawned goods, and the owner may have them again. By the 9 & 10 Vict. c. 98, pawnbrokers are restrained from taking in pledges, except between certain hours (z).

*Bailment.*]—Bailment is a delivery of goods in trust upon a contract, expressed or implied, that the trust shall be faithfully performed on the part of the bailee; by which delivery a special qualified property is transferred, together with the possession; and as such bailee is responsible to the bailor, if the goods are lost or damaged by his wilful default or gross negligence, so the bailee may maintain an action against such as injure or take them away from him; for the bailee has a legal property in them against all the world except the right owners (a a). Respecting carriers for hire by *land*, the 11 Geo. 4, and 1 Will 4, c. 68, exempts them from liability for injury or loss (except through felony of them or their servants) to certain articles where the value exceeds £10, unless the value be declared and an increased charge paid thereon (a b). There are also certain statutes relating to the liabilities of carriers by *water* (a c).

*Hiring and borrowing.*]—Hiring and borrowing are also contracts by which a qualified property may be transferred to the hirer or borrower. Hiring is always for a price or recompense; borrowing is merely gratuitous; but the law in both cases is the same. Thus, if a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period; on the expiration of which his qualified property determines, and the

owner becomes, in the case of hiring, entitled also to the premium or price for which the horse was hired.

As to the borrowing of money, provisions were formerly made preventing above a certain interest (called usury) from being taken, but by the 2 & 3 Vict. c. 37 (continued by other acts), any rate of interest may be taken on bills of exchange and promissory notes payable within 12 months, or on any loan above £10, except where lands are taken as a security (*ad*).

*Debt.*—Debt is the last species of contracts whereby a *chose in action*, or right to a certain sum of money, is mutually acquired and lost; and any contract whereby a determinate sum of money becomes due, and is unpaid, raises a debt. Debts are either of record, by specialty, or by simple contract.—A debt of record is, where any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law; and is a contract of the highest nature. Recognisances also, entered into to the Crown, together with statutes merchant, statutes staple, &c., are debts of record. Crown recognisances must be registered as against creditors, purchasers, and mortgagees (*a e*). Debts by specialty are such, whereby a sum of money becomes, or is acknowledged to be due by deed or instrument *under seal*; as covenants, bonds, &c. These are the next class of debts after those of record. Debts by simple contract are such where the contract, upon which the obligation arises, is neither ascertained by matter of record, nor yet by deed, or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed. But there is one species of simple contract, by *bills of exchange* and *promissory notes*, which we must

more particularly describe. A bill of exchange is a written order or request, and a promissory note a written promise for payment of money; the peculiar privileges of which are, that they are always *prima facie* presumed to have been made upon sufficient consideration, and negotiable. The privileges of bills of exchange depend upon the custom of merchants; and by 9 & 10 Will. 3, c. 17, 3 & 4 Anne, c. 9, 7 Anne, c. 25, notes are put on the same footing (*af*). The maker of a bill or note is called the drawer; he to whom it is directed the drawee; and the person to whom it is payable the payee. The payee has a property in action vested in him by the express contract of the drawer, in the case of a promissory note; and in the case of a bill of exchange, by his implied contract, viz., that provided the drawee does not pay the bill, the drawer will; for which reason it is usual (though by no means necessary), in bills of exchange, to express that the value thereof hath been received by the drawer, in order to show the consideration upon which the implied contract of repayment arises. The payee may, by indorsement, or merely writing his name on the back of the bill, assign over his whole property to the bearer, or, by a special indorsement, to any particular person by name; and in either case, the person to whom the bill is so transferred is called the indorsee, or holder of the bill. Indeed, if the bill be payable to "bearer" it may be transferred by mere delivery. If not payable to order or bearer, it is not transferable at all. The holder must carry the bill to the drawee for acceptance; which acceptance must be in writing except in the case of a foreign bill. If the drawee accepts the bill, he then makes himself liable to pay it; this being now a contract on his side, founded on an acknowledgment that the drawer has effects

in his hands to warrant the acceptance. If the drawer refuse acceptance, it must be *protested*, though this is not essential except in the case of a foreign bill; if it be accepted and not paid, there must be a protest also for non-payment. The amount of the bill, when refused, must be demanded of the drawer on the following day, if residing in the same town, if not, then by the post of the same day; for the responsibility of the drawer is not only conditional, with respect to the non-payment by the drawee, but that the holder should give him notice of such non-payment, in order that he may get the money which the bill supposes he has in the hands of the drawee. The indorsee of the bill may call upon either the drawer or the indorser for payment, on default of the drawee; or if there be several indorsers, upon any or all of them; for each indorser is a warrantor for the payment of the bill; but the first indorser can only resort to the drawer (*a g*).

*Bottomry.*]—Bottomry is where a sum of money is lent, for the security of which the keel or bottom of the ship is pledged; where only the merchandise of a ship is given as a security, the money is said to be taken up at *respondentia*. By the 19 Geo. 2, c. 37, if a borrower at *respondentia* hath not an interest in the ship, or in the effects on board, equal to the value of the sum borrowed, he shall be responsible to the lender for so much of the principal as hath not been laid out, with legal interest and all other charges, though the ship and merchandise be totally lost (*a h*).

*Policies of Insurance.*]—A policy of insurance, is a contract between A and B, that upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event,

By the 14 Geo. 3, c. 43, no insurance shall be made on lives, or on any other event, wherein the party insured hath no interest: in all such policies the name of the interested party shall be inserted; and nothing more shall be recovered thereon than the amount of the interest of the insured. This act does not extend to marine insurances (*ai*). By the 19 Geo. 2, c. 37, s. 4, in marine insurances no re-assurance shall be lawful, except the former insurer shall be insolvent, a bankrupt, or dead. Still a man may make a double insurance, upon which full satisfaction (but no more) may be obtained; the insurers being entitled to contribution *inter se*.

*Annuities.*.]—To prevent the great abuses that used to arise in the purchase of annuities for lives, it is enacted by the 53 Geo. 3, c. 26 (amended by the 3 Geo. 4, c. 92, and 7 Geo. 4, c. 75), that upon the sale of any life annuities the true consideration shall be set out and described in a memorial which is also to contain particulars of the date of the security, of the name of the parties, *cestui que trusts*, *cestui que vies*, witnesses, &c. The memorial must be enrolled within thirty days after its execution in the Court of Chancery, else the security shall be null and void: and all contracts for the purchase of annuities from infants are void, and cannot be confirmed after such infants come of age (*aj*).

## CHAP. XXXI.

## BANKRUPTCY.

[See 2 Black. Com. ch. 81; 2 Steph. Com. Bk. II. pt. 2, ch. 6.]

The principal statute relating to bankruptcy is the 6 Geo. 4, c. 16, since which the 1 & 2 Will. 4, c. 56, 2 & 3 Will. 4, c. 114, 3 & 4 Will. 4, c. 47, 5 & 6 Vict. c. 122, and 10 & 11 Vict., c. 102, have effected some minor alterations. The system of bankruptcy involves the three general principles of a summary and immediate seizure of all the debtor's property, a distribution of it among the creditors in general (instead of merely applying a portion of it to the payment of the individual complainant), and the discharge of the debtor from future liability for the debts then existing.

*Bankruptcy Judges.*—We may observe that the Court of Bankruptcy sits in London and consists of six commissioners sitting there, and of district courts at some of the larger towns. The commissioners may form subdivision courts for special matters. There also existed, as a superior court of general jurisdiction and of appeal, the Court of Review;

but by the 10 & 11 Vict., c. 102, the Court of Review and the offices of chief judge and other judges are abolished, and the jurisdiction is transferred to one of the Vice-Chancellors (a).

*Traders.*—As to who may be bankrupts, it may be stated that all traders may be so; that is, all persons clearly carrying on a trade, and “all persons using the trade of merchandise, by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail; and all persons who either for themselves, or as agents or factors for others, seek their living by buying and selling or by buying and letting for hire, or by the workmanship of goods or commodities.” There are particular trades enumerated in the 6 Geo. 4, c. 16, s. 2, and 5 & 6 Vict. c. 22, s. 10 (b).

The trading must be one that is carried on either within, or at least to or from the realm; and in the interpretation of the words buying and selling, it has been held, that a buying only, or selling only, will not qualify a man to be a bankrupt, but there must be both buying and selling, and also getting a livelihood by it, and also that one single act of buying and selling, will not suffice for the purpose, at least if it be unconnected with any intention of general dealing (c).

*Acts of bankruptcy.*—A man is not to be made a bankrupt merely because he is a trader, but only on account of his having done some one of the acts denominated “acts of bankruptcy.” The acts of bankruptcy by a trader are very numerous. Some of the principal ones are—remaining abroad with intent to defeat or delay creditor; absenting himself, or beginning to keep house, or suffering himself or goods to be taken in execution, escaping from



custody, or departing from dwelling house, or from the realm; suffering himself to be outlawed with like intention, making any fraudulent conveyance, or assignments, or gift of property; filing declaration of insolvency; lying in prison more than twenty-one days—(6 Geo. 4, c. 16); not satisfying judgment debt, or not paying or giving security for a debt on being summoned, under the provisions of the act 5 & 6 Vict. c. 122 (*d*).

*Fiat.—Petitioning Creditors.*—Formerly the law discouraged a man making himself a bankrupt, and thus fiats were set aside on account of their being issued by collusion; but now it is otherwise, and indeed by the 7 & 8 Vict. c. 96, s. 41, a trader may now sue out a fiat against himself on filing a declaration of insolvency. In all other instances a fiat can be sued out only by a creditor, and then not by any such, but only those of a fixed amount. A fiat may be sued out by any one creditor, or by two or more, being partners, whose debts amount to £50 or upwards, or by any two creditors whose debts amount to £70 or upwards, or by any three or more whose debts amount to £100 or upwards; and these are called the *petitioning* creditor or creditors. The first step is usually described as striking the docket, and consists in first making affidavit of the debt; and then presenting a petition on the part of such creditor or creditors, to the Lord Chancellor, praying that a fiat may be issued against the debtor. The *fiat* (formerly called a *commission*) is, in its form, a power signed by the Lord Chancellor addressed, when the trader resides in London or at a certain distance from it, to a court of record, called the Court of Bankruptcy, in London, and where he resides at a greater distance, to the court of bankruptcy for the district (which is a branch of the

former court), authorising the petitioning creditor to prosecute his complaint before those jurisdictions respectively.

The fiat is opened (that is, the proceedings upon it commenced) before the court, and proof is given of the petitioning creditor's debt, the trading, and the act of bankruptcy; but it is provided by a recent statute, that no act of bankruptcy shall suffice for this purpose, if committed more than twelve months before the issuing of the fiat. An adjudication is then made by the court, that the party is bankrupt. Of this adjudication notice is given to the bankrupt, and if he do not dispute it within five days, it is advertised, and two public sittings appointed, at which debts are proved and assignees chosen (*e*).

*Assignees.*]—The majority of creditors who have proved to the amount of £10 elect the assignees. The appointment of assignees vests in them all the bankrupt's real and personal estate, and all his rights of action (except those for merely personal wrongs), and all his rights of entry, and all powers which he is entitled to exercise, with the exception, however, of what belongs to the bankrupt in the capacity of trustee for others, any office that he holds of such a nature that it cannot legally be sold, his right of nomination to any vacant ecclesiastical benefice, his military pay under the Crown, and his military pensions under the East India Company, none of which are at all affected by the fiat, and also with the exception of estates tail and copyhold, the transfer of which is specifically provided for by the 3 & 4 Will. 4, c. 74, ss. 55—73; 6 Geo. 4, c. 16, ss. 68, 69, and of leases held by the bankrupt, which it is at the election of the assignees either to accept or renounce (*f*). In certain cases the appointment even vests in the

assignees the property of strangers left in the bankrupt's possession, it being enacted by 6 Geo. 4, c. 16, s. 72, that where the bankrupt shall, by consent of the true owner, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or had taken upon himself the sale, alteration, or disposition as owner, they shall be disposed of, together with the bankrupt's own goods and chattels, under the fiat (*g*).

*Official assignee.*—These assignees, called the creditor's assignees, call meetings, collect debts, and act generally for the benefit of the estate; but there is also another kind of assignee associated with them, not elected by the creditors, but permanently affixed to the court. He is called the *official assignee*, and his duty is to receive all moneys, and pay same into the Bank of England. Until the creditor's assignees are chosen, he is in fact a sole assignee of the bankrupt's estate.

*Contracts, &c., with bankrupt prior to fiat.*—Formerly the title of the assignees referred back to the act of bankruptcy, so as to avoid intermediate transactions, whereby innocent persons were often great losers. But by the 2 & 3 Vict. c. 29, all contracts, dealings, and transactions, by any or with any bankrupt, really and *bond fide* made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of the bankrupt, *bond fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person or persons so dealing with such bankrupt, or at whose

suit such execution or attachment shall have issued, had not (at the time) notice of any act of bankruptcy by him committed (*h*).

*Certificate.*—After the second public meeting the bankrupt may apply for his certificate of conformity; against the grant of this certificate the creditors may be heard, but it is the commissioner alone who refuses or grants it. It must afterwards be confirmed by the Vice Chancellor sitting for the abolished Court of Review. By this certificate the bankrupt is discharged from all debts and from all claims and demands whatever proveable under the fiat (*i*). He is also entitled to an allowance out of his estate, if it pays a fair dividend.

*Dividends.*—The creditors may prove their debts at the first or second public meeting, and also at any other public meeting. When the effects are got in, the assignees declare a dividend, and pay same to those creditors who have proved. Each is entitled to a dividend rateably, except that persons having securities may sell them, keep the proceeds, and take a dividend for the deficiency. And a landlord, if he distrains, is entitled to one year's rent, and to a dividend for a residue, if any (*j*). Also, a clerk or servant is allowed his wages in full for three months, not exceeding £30, and a labourer or workman wages not exceeding 40s, with liberty to have a dividend for the residue (*k*).

*Voluntary arrangements.*—In addition to strict bankruptcy, the commissioners are empowered, by the 7 & 8 Vict. c. 70, to entertain and give effect to trust deeds and other voluntary arrangements made in such manner, and according to such course of

proceedings as in the act set forth, between persons not subject to the bankrupt law and their creditors.

*Insolvency.*—We have seen that the benefits of the bankruptcy acts are confined to traders, and we have now to observe that for persons not traders (as well as traders, if they please) relief, though in a different manner and of a different nature, is granted by what is denominated the Insolvent Debtors' Court. The statutes now regulating the system of insolvency are the 1 & 2 Vict. c. 110, as to insolvent debtors, strictly so called, and the 10 & 11 Vict. c. 102 (amending the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96), as to insolvent *petitioners*, transferring the jurisdiction from the courts of bankruptcy. There are thus two classes of applicants, namely, insolvent debtors who must be prisoners, and petitioners who may or not be prisoners. The petitioner, however, if a *trader*, must not owe so much as £300. Prior to the 10 & 11 Vict. c. 102, there was but one court (sitting in London) called the "Insolvent Debtors' Court," the judges of which, however, went circuits in England and Wales three times in the year. Now, by that act these circuits are abolished, and as to insolvent petitioners, the jurisdiction (speaking generally) of the town court is confined to petitioners within twenty miles from the General Post-office; and the new county courts have jurisdiction beyond that distance. As to insolvent debtors, strictly so called, the commissioners in town have jurisdiction, but beyond the twenty miles they are to direct the county court judges to hear the case (*m*).

*Insolvent debtors.*—As to insolvent *debtors*, every person in actual custody within the walls of any

prison in England or Wales, for any debt or pecuniary demand of a civil nature (with the exception of crown debt), is entitled to apply by petition for his discharge. Within the first fourteen days of his confinement, he may apply as a matter of right, but if the petition be longer delayed, it can be filed only by leave of the court. And, indeed, any creditor who has charged him in execution may, after twenty-one days from the execution, file a petition for the purpose of having his estate dealt with and disposed of according to the provisions of the insolvent law. Upon the petition being filed, a *vesting* order is made, whereby all his property, except to the amount of £20, is vested in the provisional assignee of the court, and by the subsequent appointment of the creditors' assignees passes to the latter (without any formal conveyance), with certain exceptions. For, first, as to his leases, or agreements for leases, they have an option whether they will accept them or not. Next, if he be a beneficed clergyman or curate, their title does not extend to the income of his benefice or curacy, and they can only apply for a sequestration of his benefice. Again, they do not take under the assignment the pay, half-pay, or pension which he holds from her Majesty, or the East India Company, though a certain portion of it may, by order of the court, and consent of the proper official department, be applied to the payment of his debts. And, lastly, his landlord, distraining for rent after the imprisonment, has a preferable title to that of the assignees, to the extent of one year's arrears accrued prior to the vesting order (*n*). In the meantime the prisoner, within fourteen days after the vesting order, is to deliver into the court a schedule, containing, among other particulars, an account of all debts due or growing due from him, and of all his estate and

effects in possession, reversion, remainder, or expectancy, and of all rights and powers which either he or any person in trust for him is entitled to exercise: and such schedule is also to comprise a balance sheet of his receipts and expenditure; and when subscribed by him, is to be filed in the court, together with all books, deeds, and writings relating to the prisoner's estate. It is to be a full, true, and perfect account of that estate; and if any part of it is fraudulently omitted, the prisoner swearing to the truth of the schedule, as hereafter mentioned, will not only incur the penalties of perjury, but be liable to imprisonment with hard labour for three years. The prisoner may apply to be let out on bail till the hearing. At the hearing, either before the court in London, or by a county court judge in the country, any creditor (if due notice have been given) may oppose his discharge. The court, on the prisoner's swearing to the truth of his schedule, and executing a warrant of attorney authorising a judgment to be entered up against him in favour of the assignee, may adjudge him to be discharged from custody. This adjudication extends to all debts and sums of money due, or claimed to be due at the time of making the vesting order, to the several persons named in the schedule as creditors, or claiming to be creditors for the same respectively, or for which they shall have given credit before the time of the vesting order, and extends not only to moneys actually due, but to those payable in future by way of annuity or otherwise, and also to the claims of all other persons not known to the prisoner at the time of the adjudication, who may be indorsees or holders of any negotiable security set forth in the schedule (o). In point of time, the adjudication directs either a discharge forthwith, or at a future period, the length of which varies according to circumstances.

The assignees are to get in the insolvent's estate and debts, out of which the creditors are to be paid rateably a *dividend* until their claims shall be fully satisfied.

In bankruptcy, as we have seen, the effect of the certificate is to discharge the bankrupt's person and future property, whereas in insolvency the discharge only extends to protect his person, leaving his future acquired property liable, through the medium of the judgment on the warrant of attorney. This is the great distinction between bankruptcy and insolvency (*p*).

*Insolvent petitioners.*—We have hitherto spoken of insolvent debtors, strictly so called, but must now observe that insolvent petitioners, under the 5 & 6 Vict. c. 116, as amended by the 7 & 8 Vict. c. 96, and the 10 & 11 Vict. c. 102, on presenting a petition to the proper court, are entitled to an *interim* order of protection from arrest, or if a prisoner to his discharge; a day is then appointed for the granting of a *final* order, which when obtained discharges the party's person, and is an answer to any action for a debt mentioned in the schedule (*q*). The petitioner's property vests in the assignees, and is distributable among the creditors.



## CHAP. XXXII.

## WILLS AND ADMINISTRATION.

[See 2 Black. Com. ch. 32; 2 Steph. Com. Bk. II. pt. 2, ch. 7.]

Testament, or last will, is another method of transferring personal property. A testament, however, in some degree differs from a last will. A testament, *testatio mentis*, is where some person or persons are appointed executors, to carry the directions of the testator, with respect to his personal property, into effect, for an executor cannot meddle with a devise of real property. A last will, *ultima voluntas*, of which we have already spoken, is where no executor is appointed, as is used in the disposing of lands and tenements. There is also an instrument, which may be annexed either to a will or testament, called a codicil, derived from *codex*, a little book, and signifies nothing more than a schedule or supplement of that to which it is annexed. Testaments are either written or nuncupative.

A nuncupative testament is where the testator, without any writing, declares his will before a sufficient number of witnesses. It is called *nuncupative à nuncupando*, that is, *à nominando*, of naming; because in this species of conveyance he must make

his executor, and declare his whole mind before witnesses; and is commonly used when the testator is very sick, weak, and past all hopes of recovery, or in the cases of soldiers and sailors in actual service where the bequest exceeded the value of £30, unless certain solemnities were performed, and the 4 & 5 Anne, c. 16, made other provisions. Now, by the 7 Will. 4, and 1 Vict. c. 26 (the New Wills Act), *every* will must be in writing, and be executed as before mentioned, except the wills of the personal estate of soldiers and seamen in actual service (*a*). By the 11 Geo. 4 and 1 Will. 4, c. 20, the wills of petty officers and seamen, &c., in the royal navy, as to their wages and prize-money, are to be attested by commanding officers, and with other solemnities.

A written will is that species of conveyance which is reduced into writing at the time of the making thereof. Written wills relating to personal property only, formerly needed not any witness to their publication; for if written in the testator's own hand, though it had neither his name nor seal to it, nor witnesses present at its publication, it was good, provided sufficient proof could be had that it was his hand-writing; although written in another man's hand, and never signed by the testator, yet if proved to be according to his instructions, it was a good testament. As to wills of personalty made on or after the 1st of January, 1838, they must be in writing, be signed and executed in the same manner as wills of real estates. The only exception is as to soldiers and seamen in actual service. No testament is of any effect till after the death of the testator, until which time it is said to be ambulatory; and therefore, if a will be previously cancelled or revoked, either expressly or impliedly, by making a testament of a later date, it is void. It is also

invalid if made by an infant; or by a feme covert unauthorised to make a will by agreement with her husband; though she may devise goods which she has as executrix, and also savings from her separate estate (*b*). So a will is invalid if made by a person who from madness, idiotcy, or any other cause is adjudged not to have *liberum animus testandi*, a free and disposing mind and memory.

An executor, as we have already observed, is he to whom the execution or performance of another man's will is committed after his death; but if no will be made, the personal property of the deceased must be administered or dealt out by the law, under the direction of an administrator. All persons are capable of being executors that are capable of making wills, and many others besides; for feme coverts, infants, nay even infants unborn *in ventre sa mere*, may be executors. As to an infant, it is provided by the 38 Geo. 3, c. 87, s. 6, that administration with the will annexed shall be granted to another until the infant attain twenty-one. An executor may refuse to act or take upon himself the burden of the will; and in this case, or if the testator has made a will without naming executors, or has named persons incapable of being executors, the ordinary must grant administration *cum testamento annexo* to some other person; and then the duty of the administrator, as also when he is constituted *durante minore etate*, &c., of another, is very little different from that of an executor. The power of an executor being founded on the appointment of the deceased, he may transmit the interest with which he is vested to other persons after his decease; and the executor of the executor will, in such case, be equally the executor of the first as of the second testator; but if an executor die without making this transmission, the law will appoint an

administrator *de bonis non*, to administer the goods of the original testator not administered by the executor. The ordinary is compellable by 29 Car. 2, c. 3, to grant letters of administration of the goods and chattels of the wife to the husband or his representatives; and of the husband's effects to the widow or next of kin; but he may grant it to either, or both, at his discretion. Among the kindred, those are to be preferred who are in the nearest degree to the intestate; but of persons in equal degree, the ordinary may take which he pleases. The children of the deceased are first entitled, or, on failure of children, the parents of the deceased. Then follow brothers, grandfathers, uncles, or nephews, with the females of each class respectively, and lastly cousins. The half blood is admitted as well as the whole, and the brother of the half blood shall exclude the uncle of the whole blood; but the ordinary may grant administration to the sister of the half, or brother of the whole blood, at his own discretion. If none of the kindred of the deceased will take out administration, a creditor may do it; if the executor renounces or dies intestate, it may be granted to the residuary legatee, in exclusion of the next of kin; and in defect of all these, it may be granted to such person as the ordinary shall approve of. In the case of a bastard, the course is for some one to procure letters patent from the Crown, and then the ordinary of course grants administration to such appointee of the Crown. An administrator cannot act until letters of administration are issued, but an executor may do many things before a probate of the will is obtained (c). If, however, a stranger takes upon himself to act as executor, without any just authority, he becomes an executor *de son tort*, or in his own wrong, and is liable to all the trouble

and responsibility of the executorship, without any of the profits or advantages; for he is chargeable with the debts of the deceased so far as assets come to his hands, and as against creditors cannot retain his own debt, although he shall be allowed all payments made to any other creditor in the same or a superior degree (*d*).

As to the powers and duties of an executor:—1. He must bury the deceased in a manner suitable to the estate he leaves behind him. 2. The executor or administrator is to make an inventory of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver to the ordinary upon oath if required. 3. He is to collect all the goods and chattels so inventoried; and a sale or release by one executor shall be good against his companion; but one administrator cannot release a debt so as to bind his fellow. The property thus recovered is called *assets*, and is sufficient to make the executor or administrator chargeable to a creditor or legatee, so far as they extend. In the payment of debts, the expenses of the funeral, and proving the will, shall be first discharged. 4. Debts due to the King, on record or specialty. 5. Debts preferred by particular statutes. 6. Debts of record, as judgments, statutes, recognisances, and decrees in equity. 7. Debts due on special contracts, as for rent, or upon bonds, covenants, or the like, under seal. 8. Debts on simple contracts (*e*). Among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hand so much as his debt amounts to. If a creditor constitutes his debtor his executor, this amounts to a release at law of the debt, whether the executor acts or not. When all the debts of the deceased are discharged, the *legatees* have the next

claim. A legacy is a gift of money or chattels left by the deceased, to be paid or performed by the executor or administrator. Legacies are either general or pecuniary, as of money; or specific, as of a particular piece of plate; but in either of these cases the legatee cannot take the thing given without the assent of the executor. In case of deficiency of assets, all the general legacies must abate; or if paid, the legatees refund proportionally, in order to pay the debts, but a specific legacy is not to abate at all, unless there is not sufficient without it. A lapsed legacy is where the legatee dies in the life-time of the testator, and the legacy in this case shall sink into the general fund. But by 7 Will. 4, and 1 Vict. c. 26, gifts to children or other issue who leave issue living at the testator's death shall not lapse (*f*). A vested legacy is where the legatee has an immediate and present interest in the bequest, although it be payable at a future time; as a legacy left to one, *to be paid* when he attains the age of twenty-one years; in which case, although the legatee die before that age, the legacy shall be paid to his representatives. A contingent legacy is where a legacy is left to one *when* he attains such an age, or *if* he does such a thing; here, *if* the legatee die before the contingency happens, the legacy shall lapse in the same manner as if he had died in the life-time of the testator (*g*). When all the debts and legacies are paid, the surplus must be paid to the *residuary legatee*, if any be appointed by the will; but if there be none, it would formerly in general have gone to the executor, except it appeared to have been the testator's intention that it should not; in which case it would then have gone to the next of kin. Now, by 11 Geo. 4, and 1 Will. 4, c. 40, it is provided that unless it shall appear on the will

that the executor was intended to have the residue, he shall be deemed by a court of equity a trustee for such next of kin. The residue is to be distributed according to the direction of the 22 & 23 Car. 2, c. 10, which enacts that the surplusage of intestate's estates (except *femes covert*, which by the 29 Car. 2, c. 3, s. 25, shall go to the husband as her administrator) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: one third to the widow, and the residue in equal proportions to the children; or if dead, to their representatives or lineal descendants. If there are no children or legal representatives living, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree, and their representatives. If no widow, the whole shall go to the children. If neither widow nor children, the whole shall be distributed among the next of kin in equal degree, and their representatives; but no representatives are admitted among collaterals, farther than the children of the intestate's brothers and sisters. The next of kindred are to be investigated in the same manner as with respect to letters of administration, namely, according to the computation of the civilians, including the relations both on paternal and maternal sides. A father shall succeed to all the personal estate of his children who die intestate without wife or issue; but by the 1 Jac. 2, c. 27, if the father be dead, the mother and each of the remaining children, or their representatives, shall divide the effects in equal portions. If the intestate leaves a widow, but no next of kin, one moiety only belongs to the widow, and the other shall go to the Crown (*i*). It is, however, further enacted by the statute of distributions, that no child of the intestate, except his heir at law, on whom he settled

in his life-time any estate in lands, or to whom he gave any pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if such settlement or portion be unequal, then the surplusage may be so distributed as to make all their shares equivalent (*j*).



## CHAP. XXXIII.

## CIVIL REMEDIES WITHOUT SUIT.

[See 3 Black. Com. chaps. 1 & 2; 3 Steph. Com. Bk. V. chaps. 1 & 2.]

Having considered two of the four heads into which we divided this work (p. 37), we now proceed to the third head, namely, civil injuries, or private wrongs as they are called, by way of distinguishing them from public wrongs or crimes.

Private wrongs, or civil injuries, are an infringement, or privation, of the civil rights of individuals, considered as individuals, for which the laws of England give redress. 1, By the mere act of the parties; 2, By the mere operation of law; and 3, By suits or actions in courts. The two former will be considered in the present chapter.

*Self-defence.*—The first instance of remedy by the mere act of the parties is self-defence; as where any one, his wife, child, or (as some hold, p. 117) servant, is attacked in person or property, it is lawful for such a one to repel force by force, and the breach of peace is chargeable upon him who was the primary aggressor; but this resistance must not exceed the bounds of defence and preven-

tion; for if it does, the defender himself becomes the aggressor (a).

*Recaption.*—Recaption or reprisal is a species of remedy by the mere act of the party injured, as where one wrongfully detains another's personal chattels, or wife, child, or servant, in which case the latter may lawfully claim and retake them, wherever he happens to find them, so as it be not in a riotous manner, or attended with a breach of the peace. It is not justifiable for any one to break open a door to recover personal property, unless they have been feloniously stolen (b).

*Entry.*—Another similar remedy with respect to lands is that by entry, which now, however, is fallen into disuse, particularly since 3 & 4 Will. 4, c. 10, s. 10, by which a mere entry is not to be deemed a possession to save the statute of limitations. A peaceable entry may, it seems, be made by a landlord after the expiration of the tenant's interest. But forceable entries and detainers are punishable under several statutes.

*Abatement.*—Abatement is another remedy sanctioned by law; this happens where one places a nuisance to the annoyance of another; the latter may quietly remove it (c).

*Distresses.*—A distress is the act of seizing goods for rent, for damages, or for some dues by statute; also the act of seizing heriots.

Some chattels are exempt from distress, such as animals *feræ naturæ*; yet if deer are kept in a private enclosure for sale or profit they may be distrained upon for rent. Whatever is in the personal use or occupation of a man is for the time privileged;

as an axe with which he is cutting wood, or a horse whilst any person is riding for *damage feasant* (*d*). Valuable things in the way of trade shall not be liable to distress, as a horse standing in a smith's shop to be shoed, or in a common inn, or cloth at a tailor's house, corn sent to a mill or market, cattle when placed for a night to agist when on their way to market: all these are protected and privileged for the benefit of trade, and are supposed in common presumption not to belong to the owner of the house or premises, but to his customers (*e*). But cattle that are placed by consent of the owner to agist for a time, or in public livery stables, under the care of one who is distrained upon, are subject to distraint (*f*). Indeed the general rule is, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distrainable by him for rent; and where a stranger's goods are distrained upon, his remedy is by action on the case against the tenant.

Nothing shall be distrained upon which may not be rendered back in as good plight as when taken, for a distress is to be considered as a mere pledge. Things affixed to the freehold are not distrainable (*g*). As a general rule nothing can be distrained which is not on the premises, but by the 11 Geo. 2, c. 19, a landlord may distrain any goods of his tenant carried off the premises clandestinely (after the rent is due), wherever he finds them, within thirty days after, unless they have been sold for a valuable consideration: and all persons privy to, or assisting in, such fraudulent conveyance, forfeit double the value to the landlord: and if the value of the goods so removed be less than £50, then double the value may be recovered before two neighbouring justices of the peace.

When a distress is levied, the goods or cattle dis-

trained may be impounded in the public pound or on any part of the premises. By 5 & 6 Will. 4, c. 59, s. 4, parties impounding cattle must provide them with food, and may recover the value before a magistrate (*h*).

The tenant, if he wish to dispute the distress, may replevy, which is where a tenant applies to the sheriff, and by giving security to try the right, his cattle or goods are returned; and if the suit should be lost, the distress must be put into the hands of the distrainor, or he may sue on the bond. If goods are not replevied in five days after distress levied, they may be sold, and the overplus, if any, returned to the party distrained upon (*i*).

*Accord.—Arbitration.*—There are two instances in which redress may be obtained from the joint act of all the parties. 1. This may arise by accord and satisfaction, as where a party injuring makes satisfaction to the party injured. 2. Arbitration, as where a matter of dispute is referred to two or more persons to decide upon its merits; and if they cannot agree, it is usual to call in a third, who is to be umpire. A submission to reference is now not revocable without leave of the court or a judge. The decision in these cases is called an award. An award may be made a rule of any of the courts of record by the mutual agreement of all parties, and this being proved upon oath, the court will make a rule that such submission and award shall be conclusive; and the parties disobeying such award shall be punishable for contempt of that court under which it is made cognizable. Courts of law and of equity have the power of setting aside an award. Arbitrators have authority to administer an oath; and witnesses may be compelled to attend them (*j*).

*Retainer.—Remitter.*—Redress effected by the mere operation of law is:—1. Where a creditor is executor or administrator, and is thereupon allowed to retain his own debt; but no executor shall be allowed to retain his whole debt in preference to any other creditor of higher degree, or to the prejudice of a co-executor of equal degree (*h*). 2. Remitter is where he who hath the *jus proprietatis* or rather of entry in lands, but is unable to acquire possession without action of law, hath the freehold cast upon him by some subsequent and of course defective title; in this case he is remitted or sent back by operation of law to his ancient and more certain title, unless he be estopped by the deed. There can be no remitter to a right for which the party has no remedy by action (*l*).

## CHAP. XXXIV.

## REMEDIES BY ACTION.

[See 8 Black. Com. chaps. 8—17; 3 Steph. Com. Bk. V., chaps. 7, 8.]

Having now noticed some instances of the remedy of civil injuries without action or suit, we proceed to consider the subject of remedies by action in the common law courts. The proper court in which to sue will be noticed in a subsequent part of this work.

*Several kinds of actions.*—Actions are defined to be “the lawful demand of one’s right,” and they are distinguished into three kinds: actions personal, real, and mixed. Personal actions are, such whereby a man claims a debt, or personal chattel, or damages in lieu thereof: and likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs. Real actions, which concern real property only, are such whereby the plaintiff, called the demandant, claims the specific recovery of any lands or tenements, rents, commons, or other hereditaments; and by these actions, formerly, all disputes concerning real estates were decided: but they are now

almost totally laid aside ; a more expeditious method of trying titles having been since introduced by means of ejectment. And now, with one or two exceptions, real actions are abolished by the 3 & 4 Will. 4, c. 27, s. 36 (a). Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained—an instance of which now remains in the common action of ejectment, though some have doubted the propriety of classing ejectment as a mixed action, and have treated it (as we shall presently see) as a species of the personal action of trespass. Under these three heads may every species of remedy by suit or action in the courts of common law be comprised. But it is necessary to premise, that all civil injuries are of two kinds; the one without force, as slander and breach of contract; the other coupled with force and violence, as batteries or false imprisonment. Actions founded on contracts are either on simple contracts, as verbal agreements, notes, or contracts unsealed; or on special contracts, as deeds, instruments under seal, recognisances, or judgments; and these form the actions of assumpsit, debt, account, and covenant. Actions also are founded on torts, or wrongs; and these constitute what are termed actions of trespass. Trespass is either *vi et armis*, where the trespass is immediately injurious, and accompanied with some degree of force and violence; or on the case, where it is unaccompanied with force, and in its consequences only injurious. Both these species of actions of trespass may be divided into:—1, Trespass *vi et armis*, as trespass with respect to the person—namely, assault and battery, false imprisonment, and adultery; into trespass with respect to personal property, as replevin, and trespass *de bonis asportatis*; and into

trespass with respect to real property, as ejectment. 2. Trespass on the case likewise is divisible into trespass with respect to the person, as slander, and malicious prosecution; or with respect to personal property, as trover; and with respect to real property as in trespass on the case for an injury to the reversion (*b*).

Actions founded upon contract are, assumpsit, debt, covenant, and account.

*Assumpsit.*]—Assumpsit is an action founded on simple contract, whereby damages are recovered for the breach of any promise, contract, or undertaking. A promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If, therefore, it be to do any explicit act, it is an express contract, as if a builder undertake for a sum of money to build a house within a time limited, and fail to do it, this action of assumpsit lies against him, on his express promise, for the injury sustained by his non-performance of it. The obligations of natural justice call upon every man to do that which he ought to do, and therefore the law raises a promise to perform it; as if I employ a person to transact any business for me, or perform my work, the law raises a promise on my part to pay him so much as his labour deserves; and on this implied contract this action will also lie. *Indebitatus assumpsit* in its nature is an action of debt; as if in the case of a debt, the debtor promises to pay it, and does not, this breach of promise entitles the creditor to this action, instead of being driven to an action of debt; for in *indebitatus assumpsit*, the plaintiff recovers not only damages for the special loss, if any, but to the amount of the whole debt: and therefore a recovery in this action would be a



good bar to an action of debt brought on the same contract. The general causes for which this action may be brought are either—1, For money lent; 2, For money laid out and expended; 3, For money had and received to the plaintiff's use; 4, For the price of goods sold and delivered; 5, For the price of work and labour done; and, 6, On an account stated (c).

*Debt.*—Debt is an action founded upon an express contract, in which the certainty of the sum or duty appears, and in which the plaintiff is to recover the sum he goes for *in numero*, and not in damages; for debt, in its legal acceptation, is a sum of money due by certain and express agreement; as by bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, where the quantity is fixed and unalterable, and does not depend on any after-calculation to settle it. So also, if one verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt will lie (d).

*Covenant.*—Covenant is an action founded on contract, brought for the recovery of damages for breach of any agreement entered into *by deed* betwixt the parties. This agreement must always be by deed, but the action lies equally whether it be by indenture or deed poll. There is no set form of words necessary to be made use of in creating a covenant, and therefore any will do which show the party's concurrence to the performance of a future act, or in some cases of a present act (e).

*Account.*—Account is an action which, at common law, lay only against a guardian in socage bailiff, or receiver, and, in favour of trade, between

merchants. Now by 3 & 4 Anne, c. 16, it may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant, tenant in common, his executors and administrators, against the other as bailiff, for receiving more than his share, and against their executors and administrators. It is seldom had recourse to on account of its complex and cumbrous machinery (f).

Actions for injuries affecting the person are remedied either by an action of trespass or of trespass on the case. It will be convenient to consider the principal subject-matters giving rise to these actions, namely, slander and libel, malicious prosecution, assault and battery, false imprisonment, negligence and adultery.

*Slander.*—Slander is defaming a man in his reputation, by speaking or writing words which affect his life, office, or trade; or which tend to his loss of preferment in marriage or service; or to his disinheritance; or which occasion any other particular damage. If slander be spoken of a peer or other great man, it is called by a particular name, Scandalum Magnatum, and is punishable in a particular manner by West. 1, c. 34. Common slander may be committed,—1, By words; 2, By writing, which is called libel *in scriptis*. 3, By pictures, or representations of that sort, which is called libel *sine scriptis*. Wherever the slander may endanger a man in law, as to say that he has poisoned another, or is perjured; or where it may exclude him from society, as to charge him with having an infectious disease; or where it may impair his trade, as to call a tradesman a bankrupt, a physician a quack, a lawyer a knave; or where it may affect a peer of the realm, or magistrate, or one in a public

trust; an action on the case will lie without proving any particular damage to have happened, but merely upon the probability that it might happen. But with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened, which is called laying the action with a *per quod*. Words of heat and passion, if productive of no ill consequences, are not actionable; neither are words spoken in a friendly manner, by way of advice, admonition, or concern, or in the course of legal proceedings; for in these cases they are not *maliciously* spoken, which is part of the definition of slander. And the same is the case with privileged communications, which are such as are made on lawful occasions arising out of the position of the parties; as a master giving a character of his late servant (*g*). And if the defendant be able to justify and prove the words to be true, no action will lie, even though special damage hath ensued, for then it is no slander or false tale; and where there is no injury, the law gives no remedy. But with regard to libels, or that species of slander which affects a man's reputation by printing, writing, pictures, signs, and the like, there are two kinds of remedies; one by indictment or information for the public offence, as tending to break the peace, or provoke others to break it; and the other by action on the case to recover damages. Formerly a defendant on an indictment or information was not allowed to allege the truth of it by way of justification, but now by 6 & 7 Vict. c. 96, the defendant may allege the truth of the matters charged. So he may give in evidence in mitigation of damages (whether oral or written slander) the making or offering to make an apology. There are

other provisions in the statute for the benefit of newspaper proprietors, particularly allowing money to be paid into court (*h*). In the remedy by action the defendant could always for libel, as well as for words spoken, justify the truth of the facts, and show that the plaintiff received no injury at all (*i*).

*Malicious prosecution.*—Malicious prosecution is another action of trespass on the case with respect to the person, to recover damages for proceeding against a man by indictment, or other legal process, maliciously, and without any just ground or cause for so doing. But it is not actionable to bring a civil action, though there be no good ground for it, because it is a claim of right; if, however, one who has a cause of action to a small sum, or has no cause of action at all, maliciously sue another, with intent to imprison him for want of bail, or to do him some special prejudice, an action showing the special grievance will lie. So also, for suing a man in the ecclesiastical court for matters not cognisable there, this action lies. But it is in all cases incumbent on the plaintiff to show that the defendant prosecuted maliciously and without any probable cause, for both must concur to support this action; the malice however may, and most generally is, inferred from want of probable cause (*j*).

*Assault and battery.*—Assault and battery is an action of trespass *vi et armis*, to recover damages for an injury to the person. An assault is an attempt or offer with force and violence to do a corporal hurt to another; as by striking at him with or without a weapon, or presenting a gun at him at such a distance to which the gun will carry, or pointing a pitchfork at him standing within the reach of it, or holding up one's fist at him, or by drawing a sword, and waving it in a menacing

manner; but no words, be they ever so provoking, will amount to an assault. A battery is the unlawful touching another in a rude or angry manner, as by striking, pushing, jostling, catching by the arm, or even pulling off a button; for the least touching of another's person wilfully, and in an angry and insulting manner, is a battery; and it is not even any excuse to say that he did it *casualiter et per infortunium, contra voluntatem suam*; for no man shall be excused in trespass, unless it may be entirely justified without his default. There are, however, three sorts of defence to an action of assault and battery:—1, By denying the fact, by pleading the general issue “not guilty,” and proving the falsity of the charge. 2. By matter of excuse, which is a plea admitting the fact, but showing that it was done accidentally, without any default in the defendant. 3. By justification, as by insisting on something that made it lawful for the defendant to do the fact laid to his charge; as that the plaintiff made the first assault; or that he was a husband or servant, and did it in defence of his wife or master; or that he was a parent or master, and did it in giving moderate correction to his child, his scholar, or his apprentice. So also, in defence of a man's goods or possessions, he may justify laying hands upon another, to prevent his taking away the one, or depriving him of the other. So also, in the exercise of an office, as that of churchwarden or beadle, a man may lay hands upon another, and plead what is called a *manus molliter imposuit*, to turn him out of church during service, and so prevent his disturbing the congregation (*k*).

*False imprisonment.*—False imprisonment is an injury to personal liberty, for which an action of trespass may be brought. It consists in the un-

lawful detention of the person, without any legal authority. Every restraint of a man's liberty, under the custody of another, either in a gaol, house, stocks, or in the street, is in law an imprisonment (pp. 45, 46). To constitute the injury, therefore, of false imprisonment, there are two points requisite:—1, The detention of the person; 2, The unlawfulness of such detention. An illegal detention or arrest may be with reference to the person; as where a writ is sued out against an executor or administrator, without suggesting a *devastavit*, for otherwise they are not liable to be arrested; or if any person be arrested by civil process on a Sunday (*l*); but it is not false imprisonment to arrest a witness in returning home from the courts, or a peer of the realm, or a certificated bankrupt, or an insolvent debtor; for in the first case, the privilege is not to the person of the witness, but to the court; and in the others, the officer is justified by the writ (*m*), nor will this action lie against a judge of a court of record, for any act done by him in the execution of his office (*n*); but in general, unless a person who arrests another be authorised by process from the courts of justice, or by some warrant from a legal officer having power to commit under his hand and seal, and expressing the cause of such commitment; or for some other special cause warranted for the necessity of the thing, either by the common law or act of Parliament; such as the arresting of a felon by a private person without warrant, the impressing of mariners for the public service (p. 96), or the like; this action will lie (*o*). But the damages in which the injured party may be recompensed by means of this action, would be a very inadequate satisfaction, if the imprisonment also could not be removed; the law, therefore, has for this purpose provided the writ of

*habeas corpus*, the most celebrated writ in the English law (see pp. 44, 45).

*Negligence.*—Negligence may also be productive of injuries, for which the party may bring an action of trespass on the case; for every man ought to take care that he does not injure his neighbour; and therefore, wherever a man receives any hurt, either in his person or property, through the default of another, whether by doing some act, or by the neglect of any duty, though the same were not wilful, yet if it be occasioned by negligence, the law gives him this action to recover damages for the injuries so sustained; as where the defendant, by uncocking his gun, accidentally wounded the plaintiff, who was standing by to see him do it; or where a man retains an attorney to conduct a cause, and he by some omission loses it, and thereby injures his client; or where a person who is bound to cleanse a ditch, suffers it to become so foul that his neighbour's land is overflowed and injured; for it is no excuse for the defendant in this action to say, that the injury was involuntary on his part; but if the injury might have been avoided by the plaintiff exercising ordinary care at the time, no action will lie (*p*).

*Adultery.*—Adultery is an injury that may be offered to a person considered as a husband, for which the law gives him satisfaction, by an action of trespass *vi et armis* (or on the case) against the adulterer. The ground of this action is the injury done to the husband by alienating the affections of his wife, destroying the comforts arising from her company and that of her children, and imposing on him a spurious issue; wherein the damages recovered are usually very large and exemplary. But they are

properly increased or diminished by the particular circumstances of each case ; the rank and quality of the plaintiff, the condition of the defendant ; his being a friend, relation, or dependant of the plaintiff, or being a man of substance ; or proof of the plaintiff and his wife having lived comfortably together before her acquaintance with the defendant, and her having always borne a good character till then, as well as proof of a settlement or provision for the children of the marriage, are all proper circumstances of aggravation. On the other hand, proof that the wife had before eloped with others, or that the husband had turned her out of doors and refused to maintain her, and that he kept company with other women, or that he was acquainted with and consented to the defendant's familiarity with her, is proper in mitigation of damages ; and some authorities seem to go the extent of making the latter acts a complete defence (g).

Actions for injuries affecting a man's *personal property* are :—

*Deceit.*]—A writ of deceit lies at the common law to give damages in some particular cases of fraud, and particularly where one man does anything in the name of another, by which he is deceived or injured ; as if one brings an action in another's name, and then suffers a nonsuit, whereby the plaintiff becomes liable to costs ; or where one suffers a fraudulent recovery of lands or chattels, to the prejudice of him who hath the right. But now an action on the case in nature of deceit is more usually brought upon these occasions, which lies wherever a person has, by a false affirmation or otherwise, imposed upon another to his damage, who has placed a reasonable confidence in him ; as if a man in possession of a horse or a lottery-ticket sell



it to another for his own; for possession of a personal chattel is a colour of title, and therefore it was but a reasonable confidence which the buyer placed in him, when he affirmed it to be his own. But it is incumbent on the plaintiff to prove that the defendant knew it not to be his own at the time of the sale. So if the vendor affirm that the goods are the goods of a stranger, his friend, and that he had an authority from him to sell them, whereas in truth they are the goods of another, and he had no such authority, the action will lie. So, if a merchant sells one kind of silk for another, whereby the purchaser is imposed upon in the value. So, also, if the vendor of a horse affirm at the time of the sale that he is sound, wind and limb, whereupon the purchaser, *fidem adhibens*, gives so much; if the horse be unsound, the action will lie (*r*); but if the first contract with warranty be broken off, the warranty will not extend to a subsequent sale. And in the well-known case of *Pasley v. Freeman* (3 Term Rep. 51), it was determined by three judges against one, that where one Joseph Freeman, intending to deceive one John Pasley, did persuade the said John Pasley to deliver goods to one Falch, by falsely affirming that Falch was a person safely to be trusted and given credit to, whereas in truth he was not, which the said Joseph Freeman well knew, by which false affirmation (Falch becoming bankrupt) the plaintiff lost his goods; this action would lie, although the defendant was not benefited by the deceit, or in collusion with the person who was. The subject of fraud in representations has been much considered of late, and it has been decided that *moral* fraud must be proved in order to support an action on the case for misrepresentation (*s*). By the 9 Geo. 4, c. 14, s. 6, a representation or assurance as to the character, conduct, credit, ability,

trade, or dealings of any person to enable him to obtain credit, money, or goods, must be in writing and signed (t).

*Trover.*]—Trover and conversion is also, in its original, an action of trespass on the case, considered with respect to personal property, and lies to recover damages against such person as has *found* another's goods, and refuses to deliver them on demand, but *converts* them to his own use, from which finding and converting it is called an action of trover and conversion. This action now lies against any man who has in his possession, by any means whatsoever, the personal goods of another, and refuses to deliver them when demanded. The possession of goods by finding is not unlawful, but the finder cannot acquire a property therein, unless the owner be for ever unknown; the injury, therefore is now supposed to lie in the illegal *conversion*, which must be precisely proved, and the fact of finding or *trover* is totally immaterial (u).

*Detinue.*]—Detinue is a remedy for an unlawful detainer of personal property, and lies for the recovery of goods in specie, and also for damages for the detainer; but trover is the action in more common use. In detinue, it is necessary to ascertain the thing detained in such a manner that it may be specifically known and recovered, and therefore it cannot be brought for money, corn, and the like, for that cannot be known from other money or corn, unless it be in a bag or sack, for then it may be distinguishably marked. In order, therefore, to ground an action of detinue, these points are necessary:—1. That the defendant came lawfully by the goods, as either by delivery to him or finding them. 2. That the plaintiff have a property. 3. That the goods themselves be of some value. 4. That they may be ascertained in point of identity (v).

*Replevin.*—The action of replevin is of two sorts—first, in the *detinet*; and, secondly, in the *detinet*; and it lies in any case where a man has had his goods taken from him by another, though in practice it is confined to the taking on a distress, being a re-deliverance to the first possessor of the thing distrained, on security given by him to try the right, and to re-deliver the distress if judgment be against him. Formerly, when the party distrained upon intended to dispute the right of distress, he had no other process by the old common law than by a writ of replevin, *replegiari facias*, which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice in respect to the matter in dispute in his own county court. But to prevent the delay incident to this mode of proceeding, it is ordered by the 32 Hen. 3, c. 21 commonly called the statute of Marlbridge, that the sheriff, on complaint made, shall re-deliver the beasts taken. And to carry the directions of this act more conveniently into effect, it is enacted by 1 & 2 Philip and Mary, c. 12, that the sheriff, within two months after he receives his patent, or at his next county court, shall depute four persons, dwelling at least twelve miles from each other, to issue replevins. Upon application, therefore, either to the sheriff or one of his deputies, the sheriff, in pursuance of the 13 Edw. 1, c. 2, commonly called the statute of Westminster the Second, must take security:—First, That the party replevying will pursue his action against the distrainer, and for which purpose he puts in pledges to prosecute. Secondly, That if the right be determined against him, he will return the distress again, and for this purpose he is also bound to find *plegios de retorno habendo*. These pledges are merely discretionary in the sheriff; but on a distress

for rent, it is required by the 11 Geo. 2, c. 19, that the officer granting a replevin shall take a bond with two sureties, in a sum of double the value of the goods distrained, which bond shall be assigned to the avowant, or person making cognizance, on request made to the sheriff, and, if forfeited, may be sued in the name of the assignee (*sc*). The sheriff, on receiving such security, is immediately by his officers to cause the chattels taken in distress to be restored into the possession of the party distrained upon, unless the distrainor claims a property in the goods so taken, for in such case the sheriff cannot make replevin of them, but the party must sue out a writ *de proprietate probanda*, upon which the sheriff must summon an inquest of office, to try in whom the property previous to the distress subsisted: and if upon such inquisition the property is found in the distrainor, the sheriff can proceed no further, but must return the claim of property to the Court of King's Bench or Common Pleas, to be there farther prosecuted and finally determined. But if no claim of property be put in, or if upon trial the sheriff's inquest determines it against the distrainors, then the sheriff is to replevy the goods, making use even of force if the distrainee makes resistance, in case the goods be found within his county; but if the distress be carried out of the county, or concealed, then the sheriff may return that the goods or beasts are *eloigned*, carried to a distance, to places to him unknown, and thereupon the party replevying shall have a writ of *capias in withernam*, or *in vetito namio*, in which the sheriff is commanded to take other goods of the distrainor, in lieu of the distress formerly taken and eloigned or withheld from the owner. This distress being taken to answer the other distress by way of reprisal, goods taken in *withernam* cannot be replevied till

the original distress is forthcoming. But in common cases the goods are delivered back to the party replevying, who is then bound to bring his action of replevin. This is done by entering a plaint in the county court, under 9 & 10 Vict. c. 95, s. 119 (New County Courts Act), be the distress of what value it may: formerly either party might remove it into the superior courts—the plaintiff at pleasure, the defendant upon reasonable cause; and also if in the course of proceeding any right of freehold came in question, the sheriff could proceed no farther, so that it was usual in the first instance to carry it up to the courts in Westminster Hall. But now, by sect. 121 of 9 & 10 Vict. c. 95, the action is to be removed only where any right of freehold is in question, or where the distress was for more than £20, and then only on giving a bond with two sureties to prosecute the suit without delay, and to prove the title was in question, or that the distress was for more than £20 (*x*). As the proceedings in a replevin differ from that in ordinary actions, we will here notice them. Upon the removal the plaintiff declares, and the distrainor, who is now the defendant, makes avowry, that is, he avows taking the distress in his own right or the right of his wife, and sets forth the reason of it, as for rent arrear, damage done, or other cause; or else, if he justifies in another's right, as his bailiff or servant, he is said to make cognisance, that is, he acknowledges the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain; and on the truth and legal merits of this avowry or cognisance the cause is determined. If it be determined for the plaintiff, viz., that the distress was wrongfully taken, he has already got his goods back into his own possession, and shall keep them, and moreover recover damages.

But if the defendant prevails, and obtains judgment that the distress was legal, then he shall have a writ *de retorno habendo*, whereby the goods or chattels which were distrained and then replevied are returned again into his custody, to be sold or otherwise disposed of, as if no replevin had been made. Or, in case of rent arrear, he may have a writ to inquire into the value of the distress by a jury, and shall recover the amount of it in damages, if less than the arrear of rent; or if more, then so much as shall be equal to such arrear; and if the distress be insufficient, he may take a farther distress or distresses (*y*); but otherwise, if, pending a replevin for a former distress, a man distrains again for the same rent or service, then the party is not driven to his action of replevin, but shall have a writ of recaption, and recover damages for the defendant's contempt of the process of the law (*z*).

*Misbehaviour of officer, &c.*—Misbehaviour in an office, trust, or duty, is an injury for which the remedy is by action on the case; as if a sheriff make a false return to a writ, or a mayor to a mandamus, or deny a poll to one who stands candidate for an elective office, or for refusing to take a vote at such election, or for not returning him who is duly chosen (*a a*).

*Trespass on the case.*—Trespass on the case is an action brought for the recovery of damages for acts unaccompanied with force, and which in their consequences only are injurious; as if a man who ought to inclose against my land do not inclose, by which the cattle of his tenants enter into my land, and do damage to me. Thus also, where the defendant put up a spout in his own lands, which was

an act lawful in itself, but when it produced an injury to the plaintiff, by conveying the water into his yard, this action was adjudged to lie for such consequential injury (*a b*).

*Trespass.*]—*Trespass vi et armis* is also an action which lies for an injury done by one private man to another, where the immediate act itself occasions the injury, either to his person, goods, or lands; but having already mentioned the first, and meaning hereafter to mention the last, our present observations will be confined to those injuries which affect goods only. Thus, where entry, authority, or license, is given to any one by the law, and he abuses it, he will be trespasser *ab initio*; but when it is given by the party, he may be punished for the abuse, but he will not be a trespasser *ab initio* (*a c*); but the not doing cannot make the party who has authority or license by law, a trespasser *ab initio*, because not doing is no trespass. Thus, if a person enters into a tavern, which every man by law has a right to do, yet if he takes anything from thence, his first entry shall be deemed unlawful, and he a trespasser *ab initio*. But by 11 Geo. 2, c. 19, a distress for rent shall not be deemed irregular, nor the party deemed a trespasser *ab initio*, for an irregularity in the subsequent disposition of it (*a d*). To constitute a trespass, the act causing the injury must be voluntary, and with some degree of fault, for if done involuntarily and without fault, no action lies; but if it proceed from mistake, an action lies, for there is some fault from the neglect and want of proper care; as where one man cut another's grass in a common field, and pleaded that he had mistaken it for his own (*a e*).

An action also will lie for injuries affecting a

man's real property:—1. Such in which damages alone are to be recovered, as trespass *vi et armis*, and trespass on the case. 2. Such in which a term for years may be recovered, as ejectment. 3. Such by which a freehold may be recovered, as a writ of right, a formedon, dower, waste, assise, and *quare impedit*. We shall presently see that these latter actions, denominated real actions, are, except dower and *quare impedit*, abolished.

*Trespass.*]—Trespass *vi et armis* lies for the doing of any act which is *immediately* injurious to another's lands. Every unwarrantable entry on another's soil, is in law a breaking his close, and the trespasser may by this action be called upon to show *quare clausum querentis fregit*; for every man's land is supposed to be inclosed and set apart from his neighbours, either by a visible and material fence, as hedge, paling, walls, &c., or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close, carries necessarily along with it some damage or other; for if no other special loss can be assigned, yet still the words of the writ specify one general charge, of treading and beating down the plaintiff's grass. However, in certain cases, the law has given a right to enter on the lands of another; as if a man comes to execute a legal process, to demand money, or landlord to distrain, or reversioner to see that no waste has been done, or traveller to get refreshment at an inn, all these are cases in which an entry is allowed by law, and therefore the entry is not a trespass (*a f*). A man also may justify in an action of trespass, on account of the freehold and right of entry being in himself; and this defence brings the title of the



estate in question. One must have actual possession by entry, to be able to maintain an action of trespass; or at least it is necessary that the party have a lease and possession of the vesture and herbage of the land, or of a crop growing on the land (*a g*). A man is answerable not only for his own trespass, but that of his cattle also; for if by his negligent keeping they stray upon the land of another (and much more if he permits or drives them on), and they there tread down and spoil his neighbour's herbage, or spoil his corn or his trees, the owner must answer in damages.

*Case.*—Trespass on the case also lies to recover damages for injuries to land, where the injury happens in *consequence* of the act, and not immediately from the act itself; as if any person erects a smelting house, or works for making *aqua fortis*, and the vapour or smoke spoils the grass, corn, or injures the cattle of his neighbour, he shall pay damages for the injury sustained, and if the nuisance be not abated, a fresh action will lie (*a h*).

*Ejectment.*—Ejectment is commonly called a mixed action, by which a lessee for years, when ousted, may recover his term and damages; it is real in respect to the lands, but personal in respect to damages. Since the abolition of real actions, this mixed proceeding has become the only method of trying the title to lands or tenements; and it may be brought either on the title, or for non-payment of rent. When it is brought on the title, he who claims the land against the person in possession is supposed to make a lease for years to some fictitious person, who is then supposed to enter and be in possession until he is ejected or ousted, either by the tenant in possession, or by some fictitious

person, who is called the casual ejector; against whom the fictitious lessee brings his action for the expulsion, and he (the casual ejector) gives notice to the tenant in possession to defend his title to the land, which thereby comes in issue. The defendant is obliged to confess the lease, the entry, and the ouster; and if the issue be found against him, the lessor of the plaintiff, who is understood to be the real party, is put into possession. The action of ejectment for rent was given by the statute 4 Geo. 2, c. 28, which enacts that every landlord who hath by his lease a right of re-entry in case of non-payment of rent, when half-a-year's rent is due, and no sufficient distress is to be had, may serve a declaration in ejectment on his tenant, or fix the same on some notorious part of the premises, which shall be valid, without any formal re-entry, or previous demand of rent; and a recovery in such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid and tendered within six calendar months afterwards. By the 1 Geo. 4, c. 87, a landlord bringing ejectment on the determination of the tenancy may, after demanding possession, require the defendant to find two sureties for payment of the costs and damages. So the plaintiff may recover *mesne* profits on the trial of the ejectment. And by 11 Geo. 4, and 1 Will. 4, c. 70, provision is made where the title accrues in or after an issuable term, in the case of a country cause. And by the same statute a judge may order a writ of possession to issue immediately after the trial (*a h*). An ejectment will lie for an orchard, for a stable, a cottage, a house, a chamber described as in any story of a house; for part of a house; for a close called Dray-field, containing so many acres; for a certain place called the vestry, in D.; for a messuage and tenement; for so many acres of furze,

moor, heath, marsh, bogland, &c. ; for a coal mine, &c. (*a i*).

We now come to speak of those writs by which a freehold may, or rather might, be recovered. They are called real actions, and were of various kinds. But now by the 3 & 4 Will. 4, c. 27, s. 36, all real actions are done away with, except writ of right of dower, writ of dower *unde nihil habet* and *quare impedit*. We may here observe that a writ of right was a writ of the highest nature known in the law respecting real property, for it was not to recover the possession only, as in other writs, but the property itself; and was the only refuge to which the owner of an estate could fly to recover it, after he, or those under whom he claimed, had neglected to bring an action by writ of entry, writ of assise, either of *mort d' ancestor* or *novel disseisin*, for the space of thirty years. And by 32 Hen. 8, c. 2, no person was to have a writ of right of the possession of his ancestor, but within sixty years after disseisin complained of; nor of his own possession but within thirty years. The writ of formedon was the remedy for a tenant in tail on a discontinuance. In real actions the judgment was final and conclusive, unlike that in ejectment, which, as we have mentioned, is now the only mode in which lands can be recovered.

*Dower.*—A writ of right of dower lies where a woman has received only part of her dower, and demands the residue against the same tenant, showing the right to recover such residue. There is also a writ of dower *unde nihil habet* (which indeed is the ordinary writ), where the wife hath received no part; as where a man having lands or tenements hath made no assurance thereof of any part to his wife, so that she is driven to sue for it against the heir or his guardian. Damages in dower are given

by the statute of Merton, 20 Hen. 3, c. 1, but it extends only to lands whereof the husband died seised. The defendant may plead to this writ, that the demandant and supposed husband "*ne unques accouple in loial matrimonie*," or "*ne unques seisie que dower*" (*a j*).

*Waste.*]—A writ of waste was also an action partly formed upon the common law, and partly upon 6 Edw. 1, c. 5, the statute of Gloucester. It was a mixed action; partly real, so far as it recovered land; and partly personal, so far as it recovered damages; but it is now abolished by the 3 & 4 Will. 4, c. 27, s. 36, and an action on the case may be brought, but a very frequent remedy for this injury is by application to the Court of Chancery (*a k*).

*Quare impedit.*]—Quare impedit is a possessory action, and lies when any one is disturbed by another in his right of advowson, to present a clerk to a church when it is void. The patron of every living is bound to present within six months after the church becomes void, or the right of presentation will lapse to the bishop; but if made within that time, the bishop is bound to admit and institute the clerk, if found sufficient, unless the church be full, or there be notice of any litigation (p. 155). The patron therefore, if the delay or refusal arises from the bishop alone, as upon pretence of incapacity, or the like, brings this writ against the bishop, and he only is named in the writ; but if there be another presentation set up, then the pretended patron and his clerk are also joined in the writ; or it may be brought against the pretended patron and his clerk, leaving out the bishop; or against the patron only; but it is generally brought against all three; for if

the bishop is left out, and the suit is not determined till six months are past, the bishop is entitled to present by lapse; but if he is named and made a party to the suit, no lapse can possibly accrue till the right is determined; and therefore it is always most advisable to make him a party. If the patron be left out, and the writ is only against the bishop and the clerk, the suit is of no effect, and the writ shall abate; for the right of the patron is the principal question in the cause. If the clerk be left out, and has received institution before the action brought, as is sometimes the case, the patron plaintiff may recover the right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant and party to the suit, to hear what he can allege against it; for which reason it is the safer way to insert them all three in the writ. The plaintiff in *quare impedit* must set out his title, and prove a presentation in himself, his ancestors, or those under whom he claims; and show disturbance before action brought. The bishop and the clerk usually disclaim all title, save only, the first as ordinary to aduit and institute, and the other as presentee of the patron, who is left to defend his own right; and upon failure, then the defendant must prove his right. If the right be found for the plaintiff on the trial, it must be further inquired—1, If the church be full, and of whose presentation; 2, Of what value the living is; 3, In case of plenarty, upon an usurpation, whether six calendar months have passed since the avoidance; and if it be found that the plaintiff hath the right, and hath commenced his action in due time, he shall have judgment to recover the presentation, his damages, and by 4 & 5 Will. 4, c. 39, his costs (*a l.*).

Besides these actions for the redress of civil

injuries, there are proceedings against the Crown, and proceedings relative to civil rights by the Crown at the instigation of a private person, of which it will be proper to take notice. First, of proceedings against the Crown, which is either by petition of right, or *monstrans de droit*.

*Petition of right.*]—Petition of right is used where the sovereign is in full possession of any hereditaments or chattels, and the party suggests such a right as controverts the title of the Crown; and this may be prosecuted either in the Chancery or the Exchequer (*a m*).

*Monstrans de droit.*]—*Monstrans de droit* is used where the right of the party, as well as the right of the Crown, appears upon record; as where on an inquest of office, intitling the sovereign to lands, the whole matter is found by the jury specially, and entered on the record (*a n*).

*Quo warranto.*]—We have now to notice proceedings by the Crown at the instance of private persons, which are by *quo warranto* and *mandamus*. A *quo warranto* is a writ in the nature of a writ of right for the sovereign, against him who claims or usurps any office, franchise, or liberty; for as the Crown is the fountain of all power and jurisdiction, if any person or corporation take upon them to execute any office or jurisdiction without being legally authorised so to do by the sovereign's charter or act of Parliament, the Court of Queen's Bench will call upon them, to show by what warrant or authority they claim to execute such office or jurisdiction. The old method of doing this was by writ of *quo warranto*, but of latter times the method has been by information in the nature of *quo warranto*; but

by 4 & 5 Will. and Mary, c. 18, and 9 Anne, c. 20, such information cannot be filed without leave of the court. And by rule of court (Michaelmas Term, 3 Vict.), an affidavit must be made by the party applying, who is called the relator. But by 32 Geo. 3, c. 55, a plea of six years' exercise of the office, &c., or in the case of the office of mayor, alderman, or burgess, by 7 Will. 4, and 1 Vict., c. 78, s. 23, and 6 & 7 Vict., c. 89, of twelve months' exercise, will be a good defence unless there have been in the first case an intermediate forfeiture (*a o*).

*Mandamus.*]—A mandamus is a prerogative writ issuing out of the Court of Queen's Bench, that court having a general superintendancy over all inferior jurisdictions and persons, to enforce obedience to acts of Parliament, and to the Queen's charter, in which case it is demandable of right; but when the right is of a private nature, as to an office in which the public is not concerned, such as a deputy, register, &c., it is discretionary in the court to grant or to refuse it; therefore, upon every application for a *mandamus* it must be shown to the court what the office is. This writ also, by the 9 Anne, c. 20, is made a most full and effectual remedy for refusing to admit any person entitled to an office in a corporation, and for wrongfully removing any person who is legally possessed of a public office. It is also granted for the inspection, production, or delivery of public books and papers, and even for the examinations of witnesses in India and other British dominions in foreign parts, in which case, however, it issues out of either of the superior courts. The writ is applied for on a suggestion on oath of the party's rights, and the denial of justice below, and is usually not granted without giving the party complained of an opportunity of defending himself.

If the writ issues, the party to whom it is directed must make a return thereto. If the facts be denied, the matter is tried by a jury; but if the party object to the validity of the return, it is provided by 6 & 7 Vict. c. 67, that the prosecutor objecting to the validity of the return, shall do so by way of demurrer to the same, in like manner as in personal actions, and thereupon the writ, return, and demurrer, shall be entered on record, and the court shall adjudge either that the return is valid in law, or that it is not valid in law; or that the writ of *mandamus* itself is not valid in law; and if it adjudge that the writ is valid, but the return invalid, shall award a peremptory *mandamus*; and shall also in any event award costs to be paid to the successful party. The same statute also provides that either party shall be at liberty in every case where judgment is given against him upon a *mandamus*, whether after demurrer or otherwise, to prosecute a writ of error as in personal actions (*a p*).

*Prohibition.*—We may here notice the writ of prohibition, which issues properly only out of the Court of Queen's Bench, being the Queen's prerogative writ; but for the furtherance of justice, it may now also be had, in some cases, out of the Court of Chancery, Common Pleas, or Exchequer, directed to the judge and parties in a suit in any *inferior court*, commanding them to cease from the prosecution thereof, upon an affidavit that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognisance of some other court. The party complained of is allowed to show cause against the issuing of the writ. In cases of doubt, the court require the party applying to declare in prohibition, to which by the 1 Will. 4, c. 21, the defendant may



demur or plead, and judgment is given that the writ of prohibition do, or do not issue. Costs follow the judgment, and the plaintiff may have damages assessed, if he succeeds (*a q*).

*Scire facias*.]—*Scire facias* is a judicial writ founded on some matter of record; as judgments, recognisances, and letters patent; on which it lies to enforce the execution of them, or to vacate and set them aside. This writ, however, though it be judicial or of execution, is so far in the nature of an original, that a defendant may plead to it; and in that respect it is an action (*a r*). A *scire facias* lies for many purposes in law, the writ being framed according to the subject matter; but the principal use is to recover against bail after judgment had against the principal on the recognisance forfeited; to revive a judgment by and against the same identical parties to a suit on which judgment was had; to continue a suit by or against the representatives of the parties dying before final judgment, or after judgment and before execution (*a s*).

## CHAP. XXXV.

## PROCEEDINGS IN AN ACTION.

[See 3 Black. Com. chaps. 18—26; 3 Steph. Com. Bk. V., ch. 10.]

We now proceed to give an outline of the various ordinary proceedings in a personal action at law.

*Attorneys.—Debts under £20.*—It should here be stated that all the subsequent proceedings are supposed to be in one of the superior courts of law at Westminster, that is, either in the Queen's Bench, Common Pleas, or Exchequer of Pleas. The proceedings may be taken by the plaintiff or defendant in person, but they cannot employ any other than a duly admitted attorney or solicitor if they wish (as is the almost invariable practice) to have the proceedings conducted by another person on their behalf.

In general the debt or other claim should be 40s. at the least, and indeed, in the case of a debt it should be upwards of £20, as the new county courts have jurisdiction under that amount, and the plaintiff would not get any costs; but still if the plaintiff dwells more than twenty miles from the defendant, or the cause of action did not arise wholly or in some material point within the jurisdiction of the county court, &c., he may sue in the superior courts, though the debt be less than £20. In the case of a *tort* the amount is £5 (a)

*Writ of summons.*—The first step which a plaintiff takes in an action is suing out a writ against the defendant. Formerly there were different kinds of writs, some of which were original writs and others not so. Now, however, by virtue of the 2 Will. 4, c. 39, and 1 & 2 Vict. c. 110, s. 2, there is but one sort of writ by which every personal action is commenced, and that is called a writ of summons. This is a *judicial writ*, *i. e.* a writ issuing out of the court in which the defendant is to be sued; it is directed to the defendant, whom it commands that, within eight days after the service of the writ on him inclusive of the day of such service, he do cause an appearance to be entered for him in the court in which the action is brought, in an action on promises, or debt, or as the case may be, at the suit of the plaintiff, and requires the defendant to take notice, that in default of his so doing, the plaintiff may cause an appearance to be entered for him, and proceed to judgment and execution. In the writ itself, and in every copy thereof, the place and county of the residence, or supposed residence, of the defendant, or wherein he is, or shall be supposed to be, must be mentioned. Where several persons sue, or are sued, jointly, the names of all must be stated in the writ served upon each. The writ is tested, *i. e.*, witnessed, in the name of the chief judge of the court out of which it issues, and dated on the day on which it issued; a *memorandum* is subscribed to it, directing its execution within four calendar months from the day of its date, inclusive of the day of such date, after which period it ceases to be of force; and it must be indorsed with the name and place of abode of the attorney suing it out, but if no attorney be employed for that purpose, then with a memorandum expressing that the same was sued out by the plaintiff in person. When the

attorney actually suing out the writ sues out the same as agent for another attorney in the country, the name and place of abode of the attorney in the country must also be indorsed upon the writ. That the defendant may have an early opportunity of putting an end to the suit, by satisfying the demand against him, it is directed that upon every bailable writ and warrant, and on the copy of all process served for the payment of any debt, the amount of the debt and costs shall be stated, and that on payment thereof, within four days, proceedings will be stayed; but the defendant will be at liberty, notwithstanding such payment, to have the costs taxed. Within the time limited in the writ it should be served, if possible, on the defendant. The service must take place in the county mentioned in the writ, or within two hundred yards thereof. The person who serves the writ is to indorse on it the day of the month and week of such service, and if he do not this within three days, the plaintiff will not be at liberty to enter an appearance for the defendant, although the latter should neglect to do so. If a personal service of the writ be not effected, the plaintiff may either proceed to issue *alias* and *pluries* writs of summons, or may apply to the court, or a judge, for leave to issue a writ of *distringas*.

*Distringas.*—A *distringas* is a writ obtained, not as a matter of course, but on the application of the plaintiff, made to the court out of which the writ of summons issued or some judge of that court. This application must be founded on an affidavit, in which facts must be stated sufficient to make it appear that the defendant has not been personally served with a writ of summons, has not appeared to defend the action, and cannot be com-

pelled so to do without some more efficacious process. If, indeed, the defendant cannot be served on account of his being out of the kingdom, then, as it would be impossible to compel him to appear by any process issuing out of our courts, the plaintiff ought to resort to a proceeding called *outlawry*, the nature of which will presently be explained. The *distringas* is directed, not like the summons, to the defendant, but to the sheriff of the county in which the defendant is supposed to be, whom it commands not to omit, by reason of any liberty in the county, but that he enter the same, and distrain on the defendant to the amount of forty shillings, in order to compel his appearance; and that he make known to the court how he shall execute the writ on a certain day called the return day. It is tested and dated like the writ of summons, but must be returned by the sheriff or other officer to whom it is directed, upon the day therein mentioned, which must be in term, and at least fifteen days from the date. A notice is subscribed to it, apprising the defendant that the sheriff has distrained on him in consequence of his non-appearance, and that, in default of his appearance to this writ within eight days the plaintiff will cause an appearance to be entered for him, and proceed to judgment and execution, or (if he be subject to outlawry, and the plaintiff intend so to proceed) will proceed to outlaw him. It must be indorsed with the name and abode of the plaintiff, or of his attorney, and with the amount of the debt and costs; and a true copy of the writ, &c., must be delivered, along with the original, to the sheriff, who must cause distress to the amount of forty shillings to be made on the defendant's goods; and also serve him with the writ or copy, if he can be found; but, if it be impossible to find him, then it must be left for him. If

the defendant do not appear within the time specified in the writ, the plaintiff, if a personal service of it on the defendant or an actual distress upon his goods have been effected, may appear for him. But if the *distringas* cannot be personally served, and no goods can be found whereon to make the distress, the sheriff must, when the return day arrives, make a return of *non est inventus* and *nulla bona*; and then, if the plaintiff do not intend to proceed to outlawry, and if the defendant do not appear within eight days after the return day, the court, being first satisfied by affidavit that proper means were used to execute it, will grant the plaintiff leave to enter an appearance for the defendant (*b*).

*Outlawry.*—When the plaintiff has commenced his action by a writ of summons, he must, if he desires to outlaw the defendant, apply for a *distringas*, the notice at the foot of which differs from the usual one by stating that, in default of appearance, proceedings will be taken to outlaw him. The sheriff must return this *non est inventus* and *nulla bona*, and there must not be less than fifteen days between its return and the day of its delivery to the sheriff. The next step is to sue out a writ of *exigi facias*, directed to the sheriff, to whom the *distringas* issued, commanding him to have the defendant required at five successive county courts, or, in London, at five successive courts of hustings, till he be either outlawed, if he do not appear, or taken, if he do. The county court is held once a month, the court of hustings once a fortnight. It is therefore better and more usual to issue process of outlawry into London. As there are seldom so many as five courts of hustings between the teste and return of the *exigi facias*, another writ issues called an *allocatur exigent*, which is exactly like the

exigi facias, only that it directs the sheriff to allow the courts at which the defendant has *already* been required, and only require him at as many more as are necessary to make up the full number of five. Along with these writs issues a writ of *proclamation* to the sheriff of the county where the defendant has been usually a resident; and, if this be a different county from that to which the *exigi facias* was sent, it is called a writ of *foreign proclamation*. This writ orders the sheriff to make three proclamations to the defendant to surrender—one at the county court, another at the quarter sessions, and a third (which must be at least a month before the fifth time of requiring the defendant) at the door of the parish church immediately after divine service. The recent act, however, of 1 Vict. c. 45, has substituted for the oral making of this proclamation the fixing of it upon the church door. If the defendant do not give himself up before the return of these writs, he is *outlawed*, and a writ issues called a *capias utlagatum*, which is either *general*, commanding the sheriff to take his person, or *special*, commanding the sheriff to take him, and also to summon a jury and make inquisition of his property, extend, appraise, and seize it into the Queen's hands. Out of the Exchequer issue processes for the purpose of realising the outlaw's property: writs of *venditioni exponas*, to sell his goods; of *scire facias*, to collect his debts; and of *levari facias*, to levy the profits of his lands; and, when this has been done, the court will order the proceeds to be paid to the plaintiff in satisfaction of his claim, and the treasury will, on application, grant him a lease of the lands. There is also an outlawry on final process (c).

*Appearance.*.]—Supposing the defendant to have

been served with the writ of summons, he must, within eight days, enter an appearance in the form given by the 2 Will. 4, c. 39; and if he neglect so to do, the plaintiff may enter an appearance "according to the statute" for him. This was formerly called filing common bail (*d*).

*Arrest.*—In case the defendant be about to leave the country, the plaintiff is authorised by the 1 & 2 Vict. c. 110, s. 2, to apply for a *capias* to have him arrested. He must swear to a cause of action to the amount of £20, and that there is probable cause for believing that the defendant is about to quit England, stating the grounds for such belief. The application must be made to a judge at chambers, as the court have no jurisdiction to grant an order. It may be made at any time *between* the suing out of the writ of summons and the obtaining of final judgment; but if, by a judge's order, all further proceedings in the cause are stayed until a specified period, the plaintiff cannot, until such time has expired, obtain an order to arrest the defendant. The judge grants the order, on reading the proper affidavits, without hearing the defendant. He, at the same time, fixes the amount of bail, which, however, by the statute, is not to exceed the amount of debt or damages sworn to. The order provides that the plaintiff shall be at liberty within a specified period (usually ten days), to issue one or more writ or writs of *capias* into one or more different county or counties as may be required, indorsed to hold the defendant to bail for the sum fixed by the judge. The order does not require to be served on the defendant (*e*).

The writ of *capias* directs the sheriff to arrest the defendant, who remains in custody on such arrest until he either gives a bail bond or makes a



*Pleas—In abatement—In bar.*—The plea is the defendant's answer to the declaration, and is either a plea in abatement, or a plea in bar. A plea in abatement does not contain an answer to the cause of action, but shows that the plaintiff has committed some informality, and points out how he ought to have proceeded. A plea in bar contains a substantial answer to the cause of action. *Pleas in abatement* are not very common, and only four days after the declaration are allowed for pleading them; and they must always be verified by affidavit, which must be delivered with the plea (*k*).

A plea in bar, which is the sort of plea most usually resorted to, is one containing a substantial answer to the action. It must be put in within four days in a town cause if defendant reside within twenty miles; in all other cases the defendant has eight days to plead. A judge will, almost as a matter of course, enlarge the time. A plea in bar is either *a traverse* or a plea *in confession and avoidance*. A plea, when it denies some essential part of the declaration, is said to be a traverse. It is "in confession and avoidance" when it admits the declaration to be true, but shows some new matter not mentioned in the declaration, which destroys the plaintiff's right of action. A traverse always concludes to the country, that is, in these words, "And of this the said defendant put himself upon the country, &c." A plea in confession and avoidance always concludes with a verification—i.e., in these words, "And this the said defendant is ready to verify, &c." (*l*).

*Several counts and pleas.*—It may be remarked that by the pleading rules of Hilary Term, 1834, several counts in a declaration are not to be allowed, unless a distinct subject matter of com-

plaint is intended to be established in respect of each. And so several pleas founded on a distinct subject-matter of defence may be pleaded, but pleas founded on one and the same principal matter, though varied in statement, description, and circumstances, are not to be allowed. And where several pleas may be pleaded, a rule for leave to do so must first be obtained. This only applies where several defences are made to the *same* part of the declaration (*m*).

*Statute of limitations.*—A very common plea is that of the statute of limitations, and it is important to be known: we may here state that the times of limitation applicable to personal actions are as follow:—Actions of trespass *quare clausum fregit*, detinue, trover, case, assumpsit, and debt on any lending without specialty, must, by stat. 21 Jac. 1, c. 16, be brought within six years; and so, by stat. 3 & 4 Will. 4, c. 42, must debt upon award where the submission is not by specialty, for escapes, for copyhold fines, and for money levied under a *fieri facias*. Actions of trespass to the person must be brought within four, and for slander within two years, by 21 Jac. 1, c. 16. And by 3 & 4 Will. 4, c. 42, actions of debt or covenant, founded upon deeds or recognisances, must be brought within twenty years after the cause of action accrued, or within ten years after the end of the session of Parliament in which the 3 & 4 Will. 4, c. 42, was enacted. Actions on penal statutes are, by the combined operation of 31 Eliz. c. 5, and 3 & 4 Will. 4, c. 42, to be brought, when given to the party grieved within two years, and when to a common informer, within one. The Queen has, indeed, a further time, when part of the penalty is appropriated to her Majesty. A farther time is

given where the party is under any disability. In such case the operation of the statute is temporarily suspended, but if the disability be once removed, even for one single instant, so that the time of limitation once begins to run, nothing can afterwards stop it (*n*).

In order to prevent the statute of limitations from barring a right of action, it is usual to sue out a writ, and thus commence the action within the limited time, and, then, by suing out other writs, continue the proceedings so as to keep the action alive down to the time when it becomes expedient actually to serve the defendant. This proceeding was formerly very easy, for it was held quite sufficient to sue out a writ within the time, and that writ might be continued at any time. It is now, however, much more troublesome to keep a right of action alive in this way, for the tenth section of the 2 Will. 4, c. 39, enacts that, for the purpose of taking the case out of a statute of limitations, the defendant must either be actually served or arrested, or else each writ must be returned *non est inventus* and entered of record within a month after its expiration, that is, within five months from its date, and each subsequent writ must be sued out within a month after the expiration of the one preceding it, and must contain a memorandum specifying the date and return of the former writ (*o*).

*Replication, &c.*]—A replication is an answer to the defendant's special plea; and this answer may be either by traversing the plea, or denying the whole or some material point of it; or by confessing the matter which the defendant has pleaded, and then avoiding it by some new matter consistent with the declaration. To this replication the

defendant may rejoin, or put in an answer called a rejoinder; and the plaintiff may answer the rejoinder by a sur-rejoinder; upon which the defendant may rebut by a rebutter; and the plaintiff sur-rebut by a sur-rebutter (*p*).

*Issue.*—Issue is the end of the pleadings; for when the pleadings are brought to a point which is *affirmed* on the one side, and *denied* on the other, the parties are said to be *at issue*. An issue must, therefore, consist of an affirmative and a negative, upon which a trial may be had, and the court give judgment. Issues are of two kinds; upon *matter of law*, or upon *matter of fact*. An issue joined upon matter of law is to be determined by the judges; and this is called a demurrer.

*Demurrers.*—A demurrer signifies an abiding in point of law, and a referring to the judgment of the court, whether the declaration or plea of the adverse party is sufficient in law to be maintained. A demurrer is either general or special; general, where there is no cause particularly set forth; special, where the causes in which the party apprehends the deficiencies to consist are specified. In the margin of every demurrer there must be a statement of sufficient grounds of demurrer; and so each party must mark points for argument in his demurrer-books delivered to the judges. After hearing counsel, the court delivers judgment (*g*).

*Trials.*—An issue of fact is where the fact only, and not the law, is disputed; and in this case the truth of the matters alleged must be examined by trial. Trial is an examination of the truth of the point in issue, or of the question between the parties by those means which the law has pre-

scribed; as by record, by certificate, by witnesses, and by a jury. The first and last are the usual methods. There were also trials by inspection (which is obsolete), and by wager of battle, and by wager of law, both which have been abolished by the Legislature.

*Trial by record.*]—Trial by record, which is where a matter of record is pleaded in any action, and the parties join issue upon "*nul tiel record*," or, "that there is no such record existing;" in which case the question, whether there is such a record or not, can only be tried by the production of the record itself, or a transcript of it be of an inferior court.

*Trial by certificate.*]—Trial by certificate is allowed where the evidence of the person certifying is the only proper criterion of the point in dispute; as questions concerning the customs of London shall be tried by the certificate of the Lord Mayor, through the mouth of the Recorder (*ante*, pp. 4, 5). Also matters of ecclesiastical jurisdiction, as marriage, general bastardy, excommunication, orders, and such like matter, shall be tried by the bishop's certificate.

*Trial by witnesses.*]—Trial by witnesses, is used only in a writ of dower, where the issue is whether the husband be living or no; here two witnesses at least are requisite, because this trial is by witnesses, and not by jury.

*Trial by jury.*]—The trial by a jury of twelve is the common every-day method of trial. This takes place wherever there are issues of fact to be tried. It is called a trial at *nisi prius*. The trial takes

place before one of the judges of the superior court, though in important cases a trial at *bar* may be ordered, and then all the judges of the court attend (*s*). Where, indeed, the debt is under £20 provision is made by the 3 & 4 Will. 4, c. 42, for the trial of the cause by the sheriff or the judge of any court of record for the recovery of debt under a writ of trial (*t*). The trial at *nisi prius* takes place either at the sittings for London and Middlesex, and then usually before the chief justice, or before a judge of assize upon circuit.

The plaintiff must give the defendant a notice of trial. If in town, and the defendant reside within forty miles, eight days' notice is sufficient; if beyond that distance, then a fourteen days' notice is required. In country causes ten days is sufficient in all cases (*u*).

The plaintiff makes up the record upon which the trial is to be had, sues out the jury process, gets it returned by the sheriff, and then sets down the cause for trial.

In important cases either party may have a special jury, but such party will have to pay the expense thereof, unless the judge certifies on the back of the record that the same was a cause proper to be tried by a special jury (*v*).

Previously to the trial, each party is at liberty to sue out writs of *subpœna* to compel the attendance of necessary witnesses (*w*).

*Challenges to jury.*—When the jury are called, and before they are sworn, they may be challenged by either party. Challenges are of two sorts—Challenges to the *array*, which is an exception to the whole panel, on account of some partiality or default in the sheriff; or, Challenges to the *polls*, which are exceptions to particular jurors, as if a

lord of Parliament be impanelled; or if a juror be an alien born, or have not a sufficient estate; or if a juror be of kin to either party within the ninth degree, which is called a *principal challenge*; or if the juror be too intimate an acquaintance, or is under any other probable circumstance of suspicion, which is called a *challenge to the favour*, the validity of which must be left to the determination of the *triers*; so also a conviction of treason, felony, perjury, conspiracy, or the like, is a good cause of challenge. And if by means of these challenges, or the non-appearance of the jurors, there are not a sufficient number left, either party may pray a *tales*, or a supply of such men as where returned upon the first panel, or a *tales de circumstantibus*, of such persons who are qualified as may be present in court. In a special jury cause the deficiency is made up from the common jury panel, but a *tales* is not grantable in such a case, unless plaintiff and defendant concur.

The jury are then sworn to try the issue according to the evidence.

*Evidence.*—Evidence arises from several sorts of testimony, and is either written or unwritten. Written evidence holds the first place in the scale of probability, and consists of—1. Records. 2. Ancient deeds and wills of thirty years standing, which prove themselves. 3. Modern deeds and other writings, which must be verified by the parol evidence of witnesses. If there be a witness to a written instrument, he must be called, though if several, one will in general suffice; but if it be shown that the attesting witnesses are all dead, or otherwise incapable of giving their testimony, then proof must be given of the handwriting to one or more of their signatures. Unwritten evidence is

that which consists of proofs from the mouths of witnesses.

*Notice to admit.*]—Where a party intends to adduce in evidence any written documents, whether in his own possession or not, he must give the opposite party notice of such intention, and require him to admit same, which admission, however, it is optional (subject to a question of costs, to be decided by a judge) with him to make or refuse. If the party do not give such notice, he will not be entitled to the costs of proving the documents (*x*).

*Secondary evidence.*—*Notice to produce.*]—As to the evidence itself, it is a rule that the best evidence which the case will admit of must be produced; that is, where primary evidence is accessible, no secondary evidence will be allowed. Where the opposite party is in possession of an original document necessary to be used on the trial, *notice to produce* it must be served on him before secondary evidence can be given. There are no degrees of secondary evidence, so that where the party is entitled to secondary evidence he may resort to any species of it, though not the best in his power.

*Interested witnesses.*]—Formerly persons having any *interest* in the cause, or who had been convicted of crime, were not admissible as witnesses; but by the 6 & 7 Vict. c. 85, no witness is to be excluded from giving evidence because he may have an interest in the matter in question, or in the event of the trial or proceeding, or because he has been convicted of any crime or offence. But this is not to render competent any party to the suit or proceeding individually named in the record, or any person on whose immediate and individual behalf any action



may be brought or defended, or the husband or wife of such persons respectively (*y*).

The jury, after the proofs are summed up, are to consider of their verdict.

*Verdicts.*] — A verdict is either privy, public, or special. A privy verdict is when the judge has left or adjourned the court, and the jury being agreed, obtain leave to give their verdict to the judge out of court; but this is of no force unless afterwards affirmed by a public verdict, given openly in court, wherein the jury may if they please vary from their privy verdict: but if the judge adjourns the court to his own lodgings, and there receives the verdict, it is a *public* and not a *privy* verdict. A public verdict is that in which the jury openly declare to have found the issue for the plaintiff or for the defendant. A special verdict is when the jury find the special matter or the fact at large, and leave it to the judges to determine what is the law that arises from the fact; but they may, if they think proper, judge both of the law and the fact, and find a general verdict, in the affirmative or negative, on the issue that is joined, which is, indeed, the ordinary course.

*New trial.*]—Within four days after the trial, if in term, or within the first four days of the ensuing term, if the trial were had in vacation, the unsuccessful party may move the court for a new trial, or the defendant may move in arrest of judgment for matter appearing on the record, showing that the plaintiff had not a good cause of action, or the plaintiff may move for judgment *non obstante veredicto*, on account of the defendant's plea being no legal answer to the declaration, or either party may move for a repleader where the issue has been joined on an immaterial fact. As to a new trial, either party

may move for it, and that on account of the verdict being against evidence, that the damages are exorbitant, that the judge misdirected the jury, that there was no notice of trial, or an irregular one, and such like matters (z).

*Judgments.*] — After the verdict of the jury, the successful party is entitled to enter up judgment; but as there are other instances of judgments, it will be convenient to notice them here. Judgment is the determination, decree, or sentence of the court on the suit. Judgments are upon *default*; upon *confession*; upon *demurrer*, or issue in law; and upon *verdict*, or issue in fact; and they are either *interlocutory* or *final*.

A judgment by default is that which is given for the non-appearance of the defendant in court, or for not pleading in proper time.

A judgment by confession is when the defendant or his attorney enters a *cognovit actionem*, or a *non sum informatus*. This is often done by consent, with a *stay of execution* till a certain time, to save expense, where the action is just or the law furnishes no defence. In the cases of cognovits or warrants of attorney, there must be an attorney present on behalf of the defendant (a a).

A judgment upon verdict is the fiat of the court, to carry the verdict of the jury into execution; but this cannot be entered (unless the judge have certified for speedy execution under the 1 & 2 Will. 4, c. 7, s. 2) (a b) till the fifth day of the next term after trial had (if had in vacation); and it may be suspended by granting a new trial, or arrested for error on the face of the record, &c., as before stated.

Interlocutory judgments are such as are given in the course of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not

finally determine or complete the suit; as in pleas of abatement, where the judgment is *respondeas ouster*; or where the right of the plaintiff is only established, but the quantum of damages not ascertained, as in the cases of default in trespass, or other action for unliquidated damages; in which cases a writ of inquiry issues to the sheriff to summon a jury to inquire what the amount of the damages are. But in actions of assumpsit on bills of exchange or promissory notes a cheaper and speedier course is to refer it to the master of the court to compute principal and interest, without the aid of a jury (*a c*).

Final judgments are such as at once put an end to the action, and when entered entitle the party to process of execution.

*Effect of judgment and registering.*—All judgments have, by rule of court of Hilary Term, 4 W. 4, *reg.* 3, reference to the day on which signed. From that period the judgment binds all lands, tenements, and hereditaments of which the defendant himself, or any person in trust for him, is seised, if it be registered in the Court of Common Pleas, and be renewed every five years. Such a registered judgment will also operate as a charge in equity on the defendant's lands, &c. As to goods, they are not bound till the execution is delivered to the sheriff, and this should seem to be the case as to leaseholds with respect to a party not having notice of the judgment under s. 5 of 2 & 3 Vict. c. 11 (*a d*).

*Executions.*—Execution is the obtaining actual possession of anything acquired by judgment of law. Among the writs of execution may be first noticed the following:—1. *Habere facias possessionem*, or writ of possession after a recovery in ejectment. 2.

*De clerico admittendo*, which is a judicial writ directed, not to the sheriff, as in the two former cases, but to the bishop or his metropolitan, requiring them to admit and institute the clerk of a plaintiff who has recovered a presentation to a benefice in a *quare impedit*. 3. *A special writ of execution* issues to the sheriff in all cases where the judgment is, that something special be done in order to compel the defendant to do it; as in replevin, a writ *de retorno habendo*, and the like.

Executions in actions, where money only is recovered as a debt or damages, and not any specific chattel, are of five sorts:—1. *Capias ad satisfaciendum*, the intent of which is to imprison the body of the debtor till satisfaction be made for the debt, costs, and damages; it, therefore, doth not lie against any privileged persons, as peers, members of Parliament, executors, administrators, for the debts of the deceased, unless a *devastavit* has been returned, or such other person as could not be originally held to bail. This is a writ of the highest nature, and, therefore, when once executed, no other process can be sued out against the party's land or goods, except, by 21 Jac. 1, c. 24, the party die in execution, or have escaped, or been discharged on the ground of privilege, or of irregularity. No defendant can now be taken on a *capias ad satisfaciendum* for a debt not exceeding the sum of £20, exclusive of the costs recovered. But this does not apply to a plaintiff who has been nonsuited, for he may be taken in execution for the costs (*a e*).

2. *A fieri facias*, which commands the sheriff that he cause to be made of the *goods and chattels* of the defendant the sum or debt recovered. And by 1 & 2 Vict. c. 110, s. 12, the sheriff may take any money or bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other secu-

rities for money. And the sheriff may sue for the amount of the bills, &c. This writ lies against privileged persons, peers, &c., as well as common persons; and against executors and administrators, with regard to the goods of the deceased, and on a devastavit the plaintiff may have a fieri facias against the representative's own goods (*a f*).

3. *A levari facias* is a writ of execution which affects a man's goods and the *profits* of his lands; and by virtue of which the sheriff may seize all his goods, and receive the rents and profits of his lands till satisfaction be made to the plaintiff. This is the most ancient judicial process of the law, but little use is now made of it, the remedy by *elegit*, which takes possession of the lands themselves, being much more effectual.

4. *Elegit* is a judicial writ, given by the statute of West. 2, c. 18, either upon a judgment for a debt or damages, or upon the forfeiture of a recognizance taken in the King's court; for, by the common law, land was not liable to any debt, because the debt was contracted upon the personal security; but by this writ two things are done:—1st, The goods and chattels of the defendant, except his oxen and beasts of the plough, are delivered to the plaintiff; and, 2dly, The whole of his lands and tenements. Formerly, indeed, only a *moiety* of the defendant's lands could be taken, but by 1 & 2 Vict. c. 110, s. 11, the *whole* of the defendant's lands are to be extended, which includes lands of copyhold and customary tenure, trust estates, and estates over which he has a sole power of disposition. The goods are not sold, but delivered to the plaintiff at a reasonable appraisement and price, in satisfaction of his debt; and if the goods are not sufficient, then the lands are also to be delivered to the plaintiff to hold till out of the rents and profits thereof the debt be levied,

or till the defendant's interest be expired, and during this period the plaintiff is called tenant *by elegit*. The sheriff does not deliver actual possession of the lands, and the execution creditor, if he cannot enter and take possession without force, must bring an ejectment. When the judgment is satisfied, the best, though not only, course is for the defendant to apply for a reference to a master of the court. The plaintiff cannot sue out a *capias ad satisfaciendum*, or *fieri facias*, after having sued out an *elegit*; for he hath his election, from whence it is called *elegit*, whether he will sue out this writ, or a *capias ad satisfaciendum*, or *fieri facias*; but if execution can only be had of the goods, because there are no lands, he may have a *ca. sa.*, so that the body and goods, or the land and goods, may be taken in execution; but not body and land too, except upon some prosecutions given by statute; as statutes merchant and staple, bonds to the king (*a g*).

*Scire facias.*—It should be noticed that sometimes, before execution can be issued, a *scire facias* is necessary, which occurs chiefly where there is (1) any change of the parties by death, by marriage, or by bankruptcy or insolvency; (2) where the plaintiff has not sued out execution within a year and a day after judgment (*a h*).

## CHAP. XXXVI.

## EQUITY.

[See 3 Black. Com. ch. 27 ; 4 Steph. Com. Bk. V. ch. 14.]

Having noticed the subject of civil injuries as cognisable at law, we have now to speak of such civil injuries as are cognisable in courts of equity, and the proceedings thereon.

*Law and equity.*—Law and equity are not to be considered as in opposition to each other, though some writers treat them as being so. They say that it is the business of a court of equity to abate the rigour of the common law, but no such power belongs to equity. Courts of equity were bound by the doctrines of law as to the exclusion of half-blood from inheritances, and that the father could not succeed to the son, and so lands devised were formerly no more liable in equity to the simple contract debts (unless expressly charged) of the ancestor or devisor than at law. Again, it is said that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But this is no more than courts of law are in the habit of doing. Each endeavours to fix and

adopt the true sense of the law in question ; neither can enlarge, diminish, or alter that sense in a single tittle. It has also been said that *fraud*, *accident*, and *trust* are the proper and peculiar objects of a court of law. But every kind of fraud is equally cognisable and equally adverted to in a court of law. So many accidents are supplied at law, as loss of deeds, mistakes in receipts or accounts, wrong payments, and the like. Some accidents cannot be relieved in equity, as the omission to execute a power or a will badly executed. Some trusts are cognisable at law, as bailments, deposits, &c., though a technical trust created by the limitation of a second use, is noticed only in courts of equity. Lastly, it has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge, founded on the circumstances of each case. But the truth is that courts of equity adhere to precedents as much as courts of law, and are even less unyielding in this respect.

The rules of decision are, in fact, equally apposite to the subjects of which they take cognisance. In mercantile transactions both jurisdictions follow the marine law, and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction they both follow the law of the proper *forum* ; in matters originally of ecclesiastical cognisance they both equally adopt the canon or imperial law, according to the nature of the subject ; and if a question came before either, which was properly the object of a foreign municipal law, they would both receive information as to what is the rule of the country, and would both decide accordingly.

*Difference between law and equity.*—The essential difference between equity and law is to be



found, 1, as to the subjects over which they exercise jurisdiction; in the kind of relief they administer; and, 3, the method of proceeding.

1. *Subjects of jurisdiction.*—The jurisdiction in equity is either supplementary to the common law, or exclusive of it, or concurrent therewith. The exclusive embraces equities of redemption of mortgages, trusts strictly so called, some peculiar rights of married women, the custody and care of idiots and lunatics, of infants, and supervision of charities. The concurrent embraces accounts of partnerships, specific performance of agreements, injunctions, relief against forfeitures and penalties, proceedings *quia timet*, &c. The first comprises all subjects not falling under the preceding heads (*a*).

2. *Kinds of relief.*—Three instances of relief afforded by equity of a nature different from what is obtainable at law (which are all we can here notice), are, 1, specific performance of contracts; 2, injunctions; 3, perpetuating testimony.

*Specific performance.*—For the breach of an agreement the only remedy at law is an action for damages. But courts of equity will enforce the specific performance of agreements, without which it is obvious that in many cases the party could not have complete justice done to him. This is chiefly confined to contracts relating to land; for as to those relating to personalty, a sufficient remedy in general may be had at law. This is the ground of the distinction, and not the difference between real and personal property (*b*). As it is a maxim of equity that what ought to be done shall be considered as actually done, the contract of sale gives

birth to nearly all the same consequences in equity as would follow at law from the conveyance actually made to the purchaser at the time specified in the contract. Thus, though the legal estate remains in the vendor till the conveyance is executed, the vendor is in equity a *trustee* for the vendee from the time specified in the contract, and the purchaser, on the other hand, is a trustee for the vendor from the same period, so far as the purchase-money is concerned (c).

*Injunctions.*—These are peculiar to equity, as being prohibitive of wrongs, which is altogether beyond the scope of courts of law. Injunctions are obtained in a variety of cases to restrain the committing acts in violation of the plaintiff's rights, as waste, nuisances, trespasses, patent rights, copy-rights, &c. (d).

Before applying for an injunction, a bill must be filed, and in general it must pray for an injunction. In urgent cases an injunction may be obtained immediately upon the institution of the suit, and without previous notice. Injunctions are either special or common. The latter are upon defendant's default in appearing and answering, and are to restrain proceedings in the common law courts. All others are special (e).

*Perpetuating testimony.*—At law evidence is never taken but in an actual suit, but in equity a bill may be filed for the purpose of taking evidence, not with a view to present relief, but to be used in any future legal contest, in the event of any of the witnesses not being then forthcoming. This has been extended, by 5 & 6 Vict. c. 69, to claims to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal (f).

*Courts of equity.*—The courts of equity are, the courts called *par excellence*, the Court of Chancery, in which the Lord Chancellor sits, with its branches, of which the Master of the Rolls and the Vice-Chancellors are respectively the judges, and the courts of equity in the counties palatine, in the two universities, in the city of London, and in the Cinque Ports. We speak here only of the Court of Chancery and its branches (*g*).

*Bill.*—The first step in commencing a suit in Chancery is to file a bill. A bill is a petition in writing addressed to the Lord Chancellor, wherein the petitioner sets forth the subject of complaint, and adds such circumstances by way of allegation (which are technically called “charges”), as tend to corroborate his statement, or to anticipate and controvert the claims of his adversary, and finally he prays such relief as the nature of his case demands, and also process of subpoena against the defendant to compel him to answer upon oath to all the matters charged against him in the bill. A bill is commonly described as consisting of nine parts. The first part contains the address of the bill to the Lord Chancellor. The second part contains the names, descriptions, and places of abode of the plaintiffs. The third part is termed the stating part of the bill, which consists of the plaintiff’s case, or, in other words, the facts upon which he rests his title to relief. The fourth part consists of a general charge of confederacy against the defendant, which is now, however, frequently omitted. The fifth part consists of allegations of the defendant’s pretences and what are called charges in corroboration of them. The sixth part consists of an averment that the acts of the defendant complained of are contrary to equity, and that

his only complete remedy is through the medium of a court of equity. The seventh part consists of interrogations, and a prayer that the defendants may answer the matters alleged against them in the bill. The eighth part contains the prayer for relief. The ninth part consists of a prayer of process, that is, that a writ of subpœna may issue against the defendant to compel him to answer upon oath to all the matters charged against him in the bill. If there are several defendants, those who are to be served with copy bill only must not be named in the prayer of process.

The bill must be engrossed on parchment, signed by counsel, and be filed.

The bill filed to commence a suit is called an original bill; a supplemental bill is a bill setting forth any new matter that may have arisen since the filing of the original bill, which matter cannot be introduced by amendment. A bill of revivor is a bill to revive or set the proceedings in motion when the suit has abated by marriage, bankruptcy, or death of the parties, or other like cause.

*Subpœna.*—The bill having been filed, the next step is to sue out a writ of subpœna, commonly called, in order to distinguish it from other writs of the same name, a “subpœna to appear and answer.” If the defendant be a peer, instead of the subpœna a letter missive from the chancellor is served on him with a copy of the bill. The subpœna is a mandatory writ or process issuing out of and under the seal of the court, directed to the defendant, commanding him to appear and answer the bill. The following memorandum must be subscribed at the foot of the subpœna:—“Appearances are to be entered at the Record and Writ Clerk’s Office, in Chancery-lane, London; and if you do not cause

your appearance to be entered within the time limited by the above writ, the plaintiff will be at liberty to enter an appearance for you at your expense, and you will be subject to an attachment against your person, and such other process as the court shall award, and to such order or decree being made against you as the court shall think just upon the plaintiff's own showing."

A copy of this subpoena is made and delivered to the defendant, who on such service is obliged to appear within eight days. If the defendant refuses or neglects to do so, the plaintiff may enter an appearance for him, or may, if he please, sue out certain process against him, thence called process of contempt. In either case, however, the plaintiff's solicitor must procure an affidavit of the service of the subpoena from the person who served the defendant, which is then left with the record clerk, who then forthwith seals an attachment against the defendant, or enters an appearance, as the plaintiff pleases. If the defendant have absconded so that he cannot be served with the subpoena, the court may order him to appear at a certain day, a copy of which order is to be inserted in the *London Gazette*, and, in case of non-appearance, the court may order an appearance to be entered for the defendant.

The defendant may, of course, appear for himself, and then his appearance is effected by his solicitor filing the same with the record and writ clerks. The defendant's defence to the bill will either be by demurrer, plea, disclaimer, or answer.

*Demurrer.*] — A demurrer is that species of defence which a defendant avails himself of by showing some defect on the face of the bill itself, or in the matter contained it; as in the case of a bill not being framed correctly; or in case of the

facts therein stated being insufficient to found a decree upon; or in case the plaintiff on his own showing appears to have no right; or in case the bill seeks the discovery of a thing which would occasion a forfeiture to the defendant, or convict him of criminal misbehaviour: these all form grounds of demurrer; that is, grounds upon which the defendant may demur to the bill, and, instead of answering it, may appeal to the judgment of the court whether he can be compelled to answer it or not. So that a demurrer does not deny the truth of the plaintiff's bill, but merely objects to it on the grounds of its being, from some cause or other, insufficient to compel an answer.

*Plea.*.]—A plea is that mode of defence by which a defendant endeavours to state some new fact, not appearing on the bill, as a reason for the cause being dismissed, delayed, or barred: as a plea to the jurisdiction, which endeavours to show that the court has no cognisance of the cause; or to the person, as by showing some disability in the plaintiff, as outlawry, excommunication, and the like; or by showing some matter in bar of the suit, and in consequence of which the plaintiff can demand no relief.

*Disclaimer.*.]—A disclaimer is a mode of defence which a defendant resorts to when he has no interest or concern in the subject-matter of the suit, and defends himself by disclaiming all right or title thereto, and prays the court to dismiss him accordingly.

*Answer.*.]—An answer, which is the most usual defence of all those enumerated, is that by which the defendant controverts the case stated by the plaintiff, or denies some parts of it, or admits the

case as stated by the plaintiff in his bill, and submits to the judgment of the court thereon.

A defendant is not confined to any *one* of these forms of defence, for he may put in either one, two, or more of them to different portions of the same bill. A demurrer may be put in (written on parchment, and signed by counsel) without either the oath or the signature of the defendant. A period of twelve days, exclusive of the day of appearance, is allowed a defendant to put in a demurrer by itself; but a demurrer may be put in after the expiration of the twelve days, and within six weeks, provided it is not put in to the whole bill, and a plea or answer is put in at the same time with it to such part of the bill to which the demurrer does not apply.

The defendant is allowed six weeks from the time of his appearance to put in his answer, either to an original bill or a supplemental bill, and four weeks to put in his answer to an amended bill. If after the expiration of this time, the defendant has filed no plea, answer, or demurrer, the plaintiff may file a note, called a traversing note, stating that the plaintiff will proceed as if the defendant had filed an answer traversing the case made by the bill. This note is to have the same effect as if the defendant had traversed the allegations in the bill.

The defendant's answer is written on parchment, and the defendant then signs it, and swears to the truth of its contents, except he be a peer. When the answer is sworn it is filed with the record and writ clerks, and notice is forthwith given to the plaintiff's solicitor.

*Exceptions to answer.*—If the plaintiff considers the answer as insufficient, he may take exceptions

thereto within six weeks from the filing of the answer. The defendant may within eight days submit to the exceptions, but if he does not, the plaintiff must within six further days obtain an order to refer the answer to a master, who makes his report thereon, either allowing or disallowing the exceptions. Exceptions may be taken to this report, and the matter is then argued in court.

*Hearing on bill and answer.*—If the defendant's answer admits the allegations made by the plaintiff in his bill, then there is no necessity for a reply, for the parties, being in a condition to proceed at once to a hearing, set down the cause to be heard on bill and answer, as it is termed; that is, all that the court would have to hear in such case would be disclosed by the plaintiff's bill and the defendant's answer; no other pleadings having been found necessary to bring the matter before the court. In such case it is evident that nothing further is required but the adjudication of the court as to the effect of the matter contained in the plaintiff's bill; and it is also obvious that in such case neither party would require the testimony of witnesses, the defendant having admitted the truth of the facts alleged by the plaintiff, and thus dispensed with the necessity of adducing evidence in support of them.

If, however, the defendant's answer, instead of admitting the truth of the allegations in the plaintiff's bill, traverses or denies them, the plaintiff joins issue by a *replication*, and proves his case, as stated in his bill, by the evidence of witnesses. In this case it is also evident, that as the defendant denies the allegations of the plaintiff, he must also bring witnesses in support of such denial. Only one replication is necessary, and it merely states, "The plaintiff in this cause hereby joins issue with



the defendant." No signature is required to the replication, which is written on parchment, and filed, and notice thereof given on the same day. This brings the pleadings to a termination, and the next step is the *examination of witnesses* upon the facts in dispute between the parties.

In courts of equity the witnesses of the respective parties are not examined *vidé voce* in open court, as at law, but upon *written interrogatories*, framed by counsel and submitted to the witnesses out of court, and their answers or depositions taken in writing. When counsel has prepared these interrogatories, and signed them, they are engrossed on parchment, and filed, when the witnesses reside within twenty miles of London, with an officer of the court termed an examiner, so called because it is his office to examine the witnesses upon the interrogatories. The plaintiff's solicitor makes an appointment with the examiner for the witnesses to attend at a certain day and hour, in order to be examined. The witnesses are accordingly apprised of this appointment, and if it is thought that any one of them may be likely not to attend, a subpoena should be issued out, and a copy served on him, together with a notice signed by the examiner. By the 6 & 7 Vict. c. 85, any defendant to a cause pending in any such court may be examined as a witness on the behalf of the plaintiff, or of any co-defendant in any such cause.

When the witness has been sworn, his examination commences. Each interrogatory is proposed to him *seriatim*, and he is not permitted to read over, or to hear read, any other interrogatory, until the one in hand is entirely finished. During the examination of a witness no one is permitted to be present excepting the examiner himself. When the witness has been examined to all the interroga-

tures, the depositions or answers which he has given are read over to him and if he is satisfied with their correctness he signs them, which completes the examination, and his depositions are then good evidence, and may be read at the hearing of the cause. The cross-examination of a witness proceeds much in the same manner—viz., by the examiner submitting to him the cross-interrogatories framed for that purpose, and taking his depositions or answers in the same manner as on the examination in chief above described.

What has been said here in reference to the examination of witnesses is applicable only to such witnesses as live within twenty miles of town; when the witnesses reside beyond that distance, their examination, instead of being taken before the examiner, is taken before two commissioners appointed for that purpose, who must be barristers or solicitors not concerned in the cause, the first named of whom acts in the execution of the commission, and who proceeds to examine the witnesses upon interrogatories in the same manner as has been already described. The depositions are sealed up, and transmitted, with the commission, to the Record and Writ Clerks' Office.

*Publication.*]—When all the witnesses have been examined before the examiners or commissioner, the depositions of the witnesses are kept private in the office of such examiners, or of the clerk of Records and Writs, until the time of publication as it is termed, that is, until the time arrives when they are permitted to be made public.

Publication passes, that is, they are made public on the expiration of two months after the filing of the replication, unless the time expires in vacation, after which the depositions are open for the inspec-

tion of all parties. Sometimes, however, publication passes by consent of the parties, and sometimes by the expiration of the time to which publication has been enlarged by order. The meaning of publication being enlarged by order is, that the time within which publication ought to pass has been extended by order of the court; and when the court thus grants an order for such extension of time, it is termed enlarging publication.

*Setting down cause for hearing.*—When publication has passed, either the plaintiff or defendant may procure the cause to be set down for hearing. If the plaintiff does not set the cause down within four weeks after publication, the defendant may move to dismiss the bill. If the plaintiff sets it down, he obtains the record and writ clerk's certificate that the pleadings in the cause have been regularly filed, and takes such certificate to the registrar of the court where the hearing is to take place, and by him it is entered in a book kept for that purpose. The day on which the cause is fixed for hearing is signified to the party so setting down the cause by the registrar's clerk giving him a note to that effect, which note, however, he is not at liberty to give without the record and writ clerk's certificate before alluded to; this certificate being in the nature of an authority to the registrar to set down the cause. The cause is set down for hearing either before the Master of the Rolls, or one of the Vice-Chancellors, as may have been previously determined at the time of filing the bill.

*Subpœna to hear judgments.*—When the cause has thus been set down for hearing, and a note thereof obtained from the registrar's clerk to that effect, the next step is to sue out a subpœna to hear

judgment, to be served on the solicitor of the opposite party, in order that he may attend in court on the hearing of the cause to hear the judgment of the court; for the court is unwilling to pronounce its decree in the absence of any of the parties to be affected by it, unless after having been regularly subpœnaed they neglect to appear, in which case the court, considering such absence as a sort of abandonment of the cause, will make a decree against them.

*Hearing.*—The evening of the day before the cause is to come on it is put into a list among others, a copy of which is fixed up in the Registrar's and Writ Clerk's Offices. This list usually contains twelve causes, and is termed the paper of causes; it is made up from the Registrar's cause book, the causes being taken according to their priority as they stand in that book. The plaintiff should be prepared with an affidavit of the service of the subpœna to hear judgment, and then if defendant's counsel do not appear, a decree absolute will be made against him. If the plaintiff's counsel do not appear, the bill will be dismissed, on proof by affidavit of the service of the subpœna.

*Decree.*—After the court has heard the arguments on both sides, it then proceeds to pronounce its sentence or decree. A decree has been defined to be the order of the court pronounced on hearing and understanding all the points in issue between the parties, and determining all the rights of the parties in the suit according to equity and good conscience. The decree being usually long, minutes of it are taken down in court, from which it is afterwards drawn up in proper form. The next step is to pass the decree, as it is termed; this is done by

the parties attending before the registrar, and after being satisfied with the correctness of the decree, procuring the registrar's signature to the same: after which it is left with the entering clerk to be entered, which being done, it is then considered as passed, and may be forthwith acted upon, without being enrolled.

A decree is either final or interlocutory. It very seldom happens that a decree can be final in the first instance, and conclude the cause; for if any matters of fact are strongly controverted, the court being sensible of the inadequacy of a trial by written depositions will not bind the parties at once, but will direct such controverted matter to be tried in a court of law on what is termed a *feigned issue*; or a point of law may arise during the suit, which it may be necessary to have determined before the court can pronounce a final decree, in which case such point is referred to the common law judges to decide; or there may be long accounts to be settled, incumbrances and debts to be inquired into, and a variety of other facts to be cleared up, before a final decree can be pronounced. For these reasons a decree is usually only *interlocutory* or qualified until the impediments are removed, when the cause is again brought on for *further directions* as it is termed, and upon the matters of equity reserved, and a final decree pronounced. The further directions must be heard before the same judge as made the decree.

*Enforcing decree.*—The decree may be considered as the completion of the suit, and all that remains now to be said is as to the mode of enforcing such decree or carrying it into execution. It may be observed, however, that in many instances a compulsory process to compel a party to perform a decree

is not requisite, as parties frequently, and indeed generally, obey it voluntarily. When, however, the act decreed to be done is endeavoured to be evaded, it is then necessary to resort to some compulsory process in order to compel him to perform it. The party who seeks to have the decree performed obtains a short order of the court, requiring the other party to comply with the terms of the decree within a certain period, and a copy thereof is served personally on the party against whom the decree is to be enforced. If the party disobeys this order he is then in contempt, and the ordinary process of contempt may then be resorted to in order to enforce the decree. In the first place an attachment issues, which is not bailable; and if the party is taken and does not obey the decree, a sequestration issues against his estate and effects. If he is not taken, then either a sequestration may be issued, or the serjeant-at-arms is ordered to take the party. However, where money or costs are decreed or ordered to be paid, the party entitled may have a *fieri facias* or *elegit*, the proceedings on which are similar to what takes place in courts of law (see p. 377).

By the 1 & 2 Vict. c. 110, s. 8, all decrees and orders of courts of equity whereby any sum of money or costs shall be payable, are to have the effect of judgments in the superior courts of common law, and the persons to whom such moneys or costs are payable shall be deemed judgment creditors. The decree or order must be registered (see p. 316).

By 11 Geo. 4, and 1 Will. 4, c. 36, s. 15, when any person shall have been directed by any decree or order to execute any deed or other instrument, and shall have refused to do so, and shall have been committed to prison for such contempt, the court may, under such circumstances therein mentioned,

order one of the masters to execute the same; and where a person shall be committed for contempt in not delivering, as ordered, books, papers, or other things, any sequestrators shall have the same power to seize those articles, being in the power of the person against whom the sequestration issues, as they would have over his own property.

*Rehearing.*—If by the decree either party thinks himself aggrieved, he may petition for a rehearing before the judge by whom it was pronounced, whether the master of the rolls, or one of the vice-chancellors; or where pronounced by any but the chancellor, then for an appeal to the chancellor himself; such appeal indeed being in effect a rehearing. For whoever may have heard the cause, it is the chancellor's decree, and must be signed by him before it is enrolled; which is done, of course, unless a rehearing be desired. Every petition for a rehearing must be signed by two counsel, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to be reheard. After the decree is once signed and enrolled, it cannot be reheard or rectified, but by bill of review or by appeal to the House of Lords.

*Bill of review.*—A bill of review may be had upon apparent error in judgment, appearing on the face of the decree, or by special leave of the court, upon oath made of the discovery of new matter or evidence which could not possibly be had, or used at the time when the decree passed. But no new evidence or matter, then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review.

*Appeal to Lords.*—An appeal to the House of

Lords is the last resort of the subject who thinks himself aggrieved, either by an interlocutory order or a final determination in the Court of Chancery; and it is effected by petition to that House. The petition in this case, as in that of a rehearing, must be signed by two counsel (of those engaged in the court below or on the appeal), who must certify that there is a reasonable cause of appeal; upon presenting which, and upon the appellant's entering into recognisances to pay all such costs as the House shall think fit to award, an order is made directing the respondent to put in his answers, which being done, either party may then apply to have the cause appointed for hearing; and the appellant and respondent are respectively to deliver their printed cases, signed by one or more counsel engaged in the court below or in the hearing of the appeal, and containing a narrative of the proceedings below, with so much of the proofs as the parties intend respectively to rely upon.



## CHAP. XXXVII.

## CRIMES.

[See 4 Black. Com. chaps. 1—8; 4 Steph. Com. chaps. 1—8.]

Having described the nature of civil injuries, and given some account of the modes by which they are to be redressed, we come now to consider the nature of public injuries, or crimes and misdemeanors.

A crime is a positive breach, or wilful disregard, of some existing public law, and is generally taken to mean those offences which amount to felony. Crimes can have no existence prior to the resolution to do some criminal act, and are punishable only when that resolution is capable of proof.

*Misdemeanors.*] — Misdemeanors are also acts committed or omitted in violation of a public law, either forbidding or commanding them; but they in general denote those offences that are under the degree of felony.

*Felony.*] — Felony, in its general acceptance, comprises every species of crime which occasioned at common law the forfeiture of land or goods; and this forfeiture most frequently happens in those

crimes for which a capital punishment is or was liable to be inflicted. The definition of felony, therefore, is "an offence which occasions a total forfeiture either of lands or goods, or both, at the common law, to which capital or other punishment may be superadded, according to the degree of guilt."

*Infants. — Lunatics. — Married women.*] — The guilt of offending against any law whatsoever, necessarily supposing a wilful disobedience, can never justly be imputed to those who are either incapable of understanding it, or of conforming themselves to it; and, therefore, neither infants under the age of discretion, idiots, lunatics, nor madmen, are *primâ facie* capable of guilt: but if it appear that an infant above the age of seven years has a capacity to discern between good and evil, he shall be capable of guilt according as his discernment appears, for *malitia supplet ætatem*; but the presumption shall be in favour of his innocence until he attains the age of fourteen years, at which period he is, as to the commission of crimes, supposed to have attained discretion, and his actions shall be subject to the same modes of construction as those of the rest of society; but within the age of seven years an infant cannot be punished for any capital offence, whatever circumstances of a mischievous disposition may appear; for, *ex presumptione juris*, he cannot have discretion; and against this presumption no averment shall be admitted. As to idiots and lunatics, they are not chargeable for their acts when committed under these incapacities, not even for treason. However, in order to make out a defence on the ground of insanity, it should be shown that the accused had not a sufficient degree of reason to know the nature and quality of the act he was doing, or

that he was doing an act that was wrong. So, also, if one who has committed a capital offence becomes *non compos* before conviction, he shall not be arraigned; and provision is made by the 39 & 40 Geo. 3, c. 94, for the impanelling of a jury to decide on the insanity where the party is about to be tried or to be discharged for want of prosecution. If a man become insane after conviction, he shall not be executed; but he that is guilty of any crime through his voluntary drunkenness, shall be punished for it as much as if he had been sober; and he who incites a madman to commit a crime is a principal offender, and as much punishable as if he had done it himself. A *feme covert* shall not suffer punishment for committing a bare theft, or burglary, or robbery (it is said by some), in company with or by coercion of her husband; neither shall she be deemed accessory for receiving her husband: but these exemptions do not extend to high treason, or to any criminal act done by herself alone. Persons also committing crimes by casualty or misfortune, by ignorance or mistake *of fact*, by compulsion or necessity, are not punishable; but all these circumstances of accident, necessity, or infirmity, must be satisfactorily made out by the party who relies upon them for his excuse, unless they arise out of the evidence adduced against him.

Persons guilty of crimes may be guilty either as principals in the first degree, as principals in the second degree, as accessaries before the fact, or as accessaries after the fact.

*Principals.*]—A principal in the first degree is he that is the actor or absolute perpetrator of the crime. A principal in the second degree is he who is present, aiding and abetting the fact to be done; which presence need not always be an actual immediate stand-

ing by, within sight or hearing of the fact; for there may be also a constructive presence, as where one commits a robbery or murder, and another keeps watch or guard at some convenient distance; and, indeed, wherever a person contributes to a felony, and no other person can be considered as a principal, he shall be so considered, unless he be clearly only an accessory.

*Accessaries.*] — An accessory is he who is not the chief actor in the offence, nor present at its performance, but in some way concerned therein, either before or after the fact committed. An accessory before the fact is one who, being absent at the time of the crime committed, doth yet procure, counsel, or command, another to commit a crime; and absence is absolutely necessary to make him an accessory; for if such procurer be present, he is guilty of the crime as principal. An accessory after the fact may be where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon; and by 7 & 8 Geo. 4, c. 29, s. 54, receivers of stolen goods are made accessaries after the fact, or they may be indicted for a substantive felony, and may be transported or imprisoned. In high treason there are no accessaries, but all are principals; so also in crimes under the degree of felony.

Having described the persons who may be punished for being guilty of crimes, and the degrees of guilt of which they may be capable, we shall proceed to enumerate the several crimes and misdemeanors known to the laws of England, and firstly, of offences against God and religion.

## CHAP. XXXVIII.

## OFFENCES AGAINST RELIGION.

[See 4 Black. Com. chap. 4; 4 Steph. Com. chap. 7.]

*Apostacy.*]—Apostacy is a total renunciation of Christianity, by embracing either a false religion or no religion at all. By 9 & 10 Will. 3, c. 32, to deny by writing, printing, teaching, or advised speaking, the Christian religion to be true, or the holy scriptures to be of divine authority, is punishable, for the first offence by loss of office; for the second, by being put out of the protection of the law, and three years' imprisonment, except he repent within four months after his first conviction, and renounce his error in open court.

*Heresy.*]—Heresy consists not in a total denial of Christianity, but of some of its essential doctrines, publicly and obstinately avowed. This offence was punishable by the writ *de hæretico comburendo*; but this punishment being abolished by 29 Car. 2, c. 9, it is enacted by 9 & 10 Will. 3, c. 32, that if any person educated in the Christian religion shall maintain that there are more Gods than one, he shall suffer the same penalties and incapacities as above described in the case of apostacy.

*Reviling the Church.*]—By 1 Eliz. c. 1, whoever reviles the sacrament of the Lord's Supper shall be punished by fine and imprisonment. And by 1 Eliz. c. 2, if any minister shall speak anything in derogation of the Book of Common Prayer, he shall suffer six months' imprisonment, and forfeit a year's value of his benefice; and if any person shall in plays, songs, or other open words, speak anything in derogation, depraving, or despising of the said book, he shall forfeit, for the first offence, an hundred marks; for the second, four hundred; and for the third, all his goods and chattels, and suffer imprisonment for life.

*Nonconformity.*] — Nonconformists are of two sorts:—1. Such as absent themselves from divine worship in the Established Church, and attend the service of no other persuasion, and they were punishable by 5 & 6 Edw. 6, and 1 Eliz. c. 2, but these statutes are, so far as respects such provisions, repealed by the 9 & 10 Vict. c. 59. The second species of nonconformists are Papists and Protestant Dissenters; but the penalties to which these offenders were once liable are, by the Toleration Act of 1 Will. and Mary, c. 18, and subsequent acts, taken away with respect to dissenters, and by the 18 Geo. 3, c. 60, 10 Geo. 4, c. 7, and 9 & 10 Vict. c. 59, and other statutes, with respect to Roman Catholics, so that it is needless to notice the old provisions on the subject. By the 9 & 10 Vict. c. 59, s. 2, the Jews are subject to the same laws as Protestant Dissenters in respect to schools and places of worship.

*Blasphemy.*]—Blasphemy, by denying the being or providence of God, or by uttering contumelious reproaches of Our Saviour Christ, is punishable by fine and imprisonment, at the common law.

*Profane cursing and swearing.*—By 19 Geo. 2, c. 21, if any person shall profanely curse or swear, and be convicted on the oath of one witness, or by confession, or by the hearing of one magistrate, he shall forfeit, first, every day-labourer, common soldier, sailor, or seaman, one shilling; secondly, every other person under the degree of a gentleman, two shillings; thirdly, every person of or above the degree of a gentleman, five shillings. On a second conviction double, and for every other treble, the sum first forfeited.

*Witchcraft.*—By 9 Geo. 2, c. 5, whoever shall pretend to exercise the arts of witchcraft, sorcery, enchantment, or conjuration, or shall undertake to tell fortunes, or pretend by crafty science to discover stolen goods, are liable to be imprisoned for a year, and find sureties as the court shall direct. And by 5 Geo. 4, c. 83, s. 4, persons using any subtle craft, means, or device, by palmistry or otherwise, to deceive people, shall be deemed rogues and vagabonds.

*Religious impostors.*—Religious impostors are such as falsely pretend an extraordinary commission from Heaven, or terrify and abuse the people with false denunciations of judgments, and are punishable by fine, imprisonment, and infamous corporal punishment.

*Sabbath-breaking.*—As to sabbath-breaking, or profanation of the Lord's-day, by the 27 Hen. 6, c. 5, all manner of fairs and markets on feast days, or on Sundays, the four Sundays in harvest excepted, shall clearly cease, on pain of forfeiting the goods exposed to sale. By 1 Car. 1, c. 1, there shall be no meetings, assemblies, or concourse of

people out of their own parishes on the Lord's-day, nor any unlawful exercises and pastimes, used by any person or persons within their own parishes, on pain of forfeiting 3s. 4d. to the poor for every offence. By 29 Car. 2, c. 7, no tradesman, labourer, or other person above the age of fourteen years, shall exercise any worldly business, labour, or work of their ordinary callings, on the Lord's-day, works of necessity and charity only excepted, on pain of forfeiting five shillings. And also that no person shall publicly cry, shew forth, or expose to sale, any wares on the Lord's-day, on pain of forfeiture; and that no drover, waggoner, or their servants, shall travel or come to his inn or lodging, on pain of twenty shillings. And that no person shall serve any process on the Lord's-day, except in cases of treason, felony, or breach of the peace, but the same shall be void, and the offender liable in damages (a). By the 21 Geo. 3, c. 49, every place of public entertainment or debating, opened on any part of the Lord's-day, to which admittance shall be had for money or by tickets, or by charging an extraordinary price for refreshments, shall be deemed a disorderly house.

*Drunkenness.*]—Drunkenness is punished by 4 Jac. 1, c. 5, and 21 Jac. 1, c. 11, ss. 1, 3, with the forfeiture of five shillings.

*Lewdness.*] — Open and notorious lewdness, grossly scandalous, is an offence indictable at common law, and punishable by fine and imprisonment.



## CHAP. XXXIX.

## OFFENCES AGAINST THE LAW OF NATIONS

[See 4 Black. Com. ch. 66; 4 Steph. Com. ch. 8.]

*Violation of passports.*—Truce-breaking, or the violation of passports expressly granted by the King or his ambassadors to the subjects of a foreign power, in the time of mutual war, is a breach of the public faith, and was, by 2 Hen. 5, c. 6, declared high treason; but by 20 Hen. 6, c. 2, and 31 Hen. 6, c. 4, is punishable by restitution and forfeiture.

*Violating the rights of ambassadors.*—By 7 Anne, c. 12, all process whereby the person of any ambassador, or his domestic servant, may be arrested, or his goods distrained or seised, shall be utterly void; and all persons prosecuting, soliciting, or executing such process, shall be deemed violators of the law of nations, disturbers of the public repose, and shall suffer such penalties and corporal punishment as the lord chancellor and the chief justice shall, on conviction, think fit (*a*).

*Piracy.*—Piracy is a felony against the goods of any other person, by a depredation or robbing at

sea. Formerly it was only cognisable in the Admiralty courts; but by 28 Hen. 8, c. 15, all felonies and robberies committed upon the sea, or in any haven, creek, river, or place where the admiral hath or pretends to have jurisdiction, shall be tried in such county within England as shall be appointed by special commission; and a new jurisdiction is established for this purpose, of which mention will hereafter be made. By 11 & 12 Will. 3, c. 7, if any natural-born subject commits any act of hostility upon the high seas against others of his Majesty's subjects, under colour of a commission from any foreign power; this, though it would only be an act of war in an alien, is construed piracy in a subject. And farther, any commander or other seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition, or goods, or yielding them up voluntarily to a pirate; or conspiring to do these acts; or any person assaulting the commander of a vessel, to hinder him from fighting in defence of his ship, or confining him, or making or endeavouring to make a revolt on board, shall, for each of these offences, be adjudged a pirate, felon, and robber. By the statute 8 Geo. 1, c. 24, the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating, or corresponding with them; or the forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard, shall be deemed piracy. By the 18 Geo. 2, c. 30, subjects, or denizens, during war, committing hostilities upon the sea against subjects, under colour of a commission from enemies, or adhering or giving aid or comfort to enemies upon the sea, may be convicted as pirates. And by the 5 Geo. 4, c. 113 (amended

by 7 Will. 4 and 1 Vict. c. 91, and extended by 6 & 7 Vict. c. 98, s. 1), carrying away any person on the high seas for the purpose of his being brought to any place as a slave, or being sold as such, or embarking any person for such purpose, and dealing in slaves and other offences connected therewith, is declared piracy, felony, and robbery.

The general punishment for piracy is, by 7 Will. 4 and 1 Vict. c. 88, transportation for not less than fifteen years, or imprisonment for any term not more than three years; but by sect. 2 of the same act it is enacted, that whosoever, with intent to commit the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of, or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony, and suffer death as a felon.

## CHAP. XL.

## OF OFFENCES AGAINST THE GOVERNMENT.

[See 4 Black. Com. ch. 6—9; 4 Steph. Com. ch. 6.]

*High treason.*—High treason strikes ultimately at the well-being of sovereignty, is the foulest crime that can be committed, and ought therefore to be the most precisely ascertained. At the common law the nature of this offence was vague and undefined, but the statute of 25 Edw. 3, c. 2, describes what offences only, for the future, should be held to be treason. That statute enacts that “When a man doth compass or imagine the death of our lord the King, of our lady his Queen, or of their eldest son and heir, and thereof be provably attainted of open deed by people of their condition, it ought to be adjudged treason.” The King here intended is, the King in possession, without any respect to his title; for it is held that a King *de facto*, and not *de jure*, is a King within the meaning of the act. The Queen regnant, as Queen Victoria, is a King within this act; but the husband of such a Queen is not. The son of a King, admitted by act of Parliament *in consortium imperii*, as was done by Henry II., whereby there was *rex pater* and *rex*

*filius*, is a King within this statute. But a Queen Dowager, or Princess Dowager, or Queen divorced *a vinculo matrimonii*, the wife of the King's second son, the King's eldest daughter, nor any collateral heir apparent, are within the statute.

The words *compass* or *imagine* are synonymous terms, signifying the purpose or design of the mind or will; and therefore, being an internal act, must be demonstrated by some *open deed*, or, as it is usually called, *overt act*. Thus, to provide weapons or ammunition, or poison, or to send letters for the execution thereof, for the purpose of killing the King, is held to be a palpable overt act of treason, in imagining his death. So also, if men conspire to imprison the King by force until he hath yielded to certain demands, and for that purpose to gather company or write letters, is an overt act to prove the compassing the King's death. It has been held, that words written are an overt act of treason, but that words spoken cannot be construed into such an overt act; for it now seems clear, that words spoken, unless in prosecution of a traitorous purpose, amount only to a high misdemeanour, and no treason; neither will a mere concealment of a traitorous confederacy amount to treason; for there must be alleged and proved some act declaratory of the intention, some positive participation in the guilt, some consultation, persuasion, or means of incitement; but the least advice given in a treason, though inchoate, and never executed, will make the adviser guilty of this offence. And indeed, everything wilfully and deliberately designed or attempted to be done, whereby the life of Majesty may be endangered, is an act of compassing his death; but the guilt only commences when some measure shall appear to have been taken to effectuate the guilty purpose.

*To violate the Queen or Princess.*—By 25 Edw. 3, c. 2, "If a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir, and be thereof provably attainted of open deed by people of their condition, it ought to be adjudged treason." Violation here implies a carnal knowledge, by whatever means obtained; for if both parties be consenting, they are equally guilty of treason. By the King's companion is meant his wife; but no Queen or Princess Dowager is any way within the purview of this act.

*Levying war against the Sovereign.*—By 25 Edw. 3, c. 2, "If a man do levy war against our lord the King in his realm, and be thereof provably attainted of open deed by people of their condition, it ought to be adjudged treason." Under this description a mere conspiracy to levy war, unless directly against the King, is not treason; but in a conspiracy for more remote purposes, if war be actually levied by some of the conspirators, they are all considered as principal traitors. The words of the statute seem to imply a military assemblage, or armed insurrection, not upon a private quarrel between private individuals, not in maintenance of a personal claim, or in pursuit of a particular redress; but such a rising as may in judgment of law be intended to have been against the person of the King, to seize, dethrone, or imprison him; or to oblige him by violence to alter the measures of his government, or to compel a change in the religion settled by law; or to withhold castles or fortresses by weapons offensive and invasive; or a wilful un-compelled joining with open rebels; or, in short, every effort of positive rebellion. But it has been held, that a rising with intention to kill one of the

privy council; a tumultuary combination to compel the King to put away his ministers; an armed force with a general purpose to destroy enclosures, to deliver prisons, or to demolish bawdy-houses, or to pull down meeting-houses of dissenters, in which cases the universality of the design is construed into rebellion; and lastly, insurrections to effect redress or innovation, in which the insurgents have no special interest, or forcibly to render ineffectual any act of Parliament or law of the realm, are all severally adjudged to be a *levying of war* within the statute.

*Adhering to the King's enemies.*—By 25 Edw. 3, c. 2, "If a man be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be provably attainted of open deed by people of their condition, it ought to be adjudged treason." By "enemies" are meant all aliens in notorious hostility. The solemnity of a previous denunciation of war is not always necessary; for, whether the persons adhered to were the King's enemies, is a matter of fact to be averred and evidenced by its public notoriety. Furnishing money, arms, ammunition and provisions, or sending intelligence to the King's enemies, are acts of adherence, even though they should be intercepted in their passage; for the treason, though ineffective, is complete on the part of the traitor. A subject of the enemy-country continuing under the protection of England, and practising while in England to the aid and assistance of that enemy-country, comes under the words of the statute; but mere residence in a hostile kingdom is not in itself an adherence, though a refusal to return to the mother country upon proclamation may be evidence thereof. Other acts of adherence

are, actual war against the King's allies; the treacherous surrendering, in collusion with the enemy, of a place of defence; a voluntary oath of fealty to the enemy-King, or cruising under his commission, though without any absolute act of hostility.

In the four preceding treasons it is required by the statute, that the offenders be "thereof *provably* attainted of *open deed* by people of their condition."

"The adverb *provably*," says Sir Edward Coke, "hath great force, and signifies a direct and plain *proof*." An overt act is that by which the traitorous design is demonstrated, and it must not only be shown at the trial, but must be specifically and correctly charged in the indictment, in order that the person accused may be prepared to refute, explain, or defend it. Conspiring the King's death, providing weapons to effect it, sending letters to incite others to procure it, assembling people in order to take the King into their power, and all other such like notorious facts, done in pursuance of a traitorous purpose against the King, may be alleged as overt acts, to prove the compassing his death.

*Counterfeiting the seals.*—By 25 Edw. 3, c. 2, "If a man counterfeit the King's great or privy seal, it ought to be adjudged high treason." These words extend to the aiders and consenters to such counterfeiting, as well as to the actors; but not to the taking wax bearing the impression of the great seal off from one patent, and fixing it to another. By 11 Geo. 4, and 1 Will. 4, c. 66, this provision of the 25 Edw. 3, is repeated, but it is re-enacted thereby, and the punishment is reduced to transportation or imprisonment.

*Counterfeiting money.*—By 25 Edw. 3, c. 2, "If a man counterfeit the King's money, or bring false



money into the realm, counterfeit to the money of England, knowing the money to be false, it is high treason." But by 2 Will. 4, c. 34, this offence is reduced to a felony.

*Slaying the judges.*—By 25 Edw. 3, c. 2, "If a man slay the chancellor, treasurer, or the King's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places, doing their offices, it is high treason." This does not extend to an attempt to kill, nor to actual wounding, unless death ensue; nor to any other officers but those expressly named; therefore the barons of the exchequer are not within the protection of the act.

By the 36 Geo. 3, c. 7, s. 1 (made perpetual by the 57 Geo. 3, c. 6, and as partially repealed by the 11 Vict. c. 12), if any person shall compass, imagine, or intend death, or destruction, or any bodily harm, imprisonment or restraint of the King, his heirs or successors, or to depose him or them, or to levy war, within this realm, in order to compel a change of measures or counsels; and such compassing, &c., shall express by publishing, or by any overt act or deed, such person shall be adjudged a traitor, and shall suffer death.

As to the offence of treason generally, we may observe that it is (by exception from the general rule of the Crown law) subject to a limitation in respect of time, for by the 7 Will. 3, c. 3, no person shall be prosecuted for treason but within three years after the commission of the offence, except in the case of a designed assassination of the sovereign by poison or otherwise. The punishment of treason in general is:—1, That the offender be drawn on a hurdle to the place of execution; 2, That he be hanged by the neck until he be dead; 3, That his

head be severed from the body; 4, That his body be divided into four quarters; 5, That his head and quarters shall be at the disposal of the Crown. But the Queen may, after sentence, by warrant under the sign manual, countersigned by a principal secretary of state, change the whole sentence into beheading. And the sentence upon women is, to be drawn to the place of execution and hanged by the neck until they be dead.

*Attempts against the Government, being felonies.] —* The 11 Vict. c. 12, after repealing the 36 Geo. 3, c. 7, and 57 Geo. 3, c. 6 (above mentioned), except as to offences against the person of the Sovereign, enacts that if any person shall compass, imagine, or intend to deprive or depose the Queen, her heirs, or successors from the style, honour, or royal name of the Imperial Crown of the United Kingdom, or of any other of her Majesty's dominions and countries, or to levy war against her Majesty, within any part of the United Kingdom, in order by force or constraint to compel her to change her measures or counsels, or in order to put any force or constraint upon, or in order to overawe Parliament, or to move or stir any foreigner or stranger with force to an invasion, and such compassings, &c., shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony, and may be transported for life or for any term not less than seven years, or be imprisoned for not more than two years, with or without hard labour. The information as to open and advised compassing, &c., by speaking, must be taken within six days after the speaking, and a warrant be issued within ten days after the information. Indictments are valid, though the facts proved may

amount to treason, and principals in the second degree, and accessories before the fact, are to be punished in the same manner as principals in the first degree. Accessories after the fact are to be imprisoned for two years. No costs are to be allowed in prosecutions under this act. The act does not repeal the 25 Edw. 3, c. 2. Also by the 5 & 6 Vict. c. 51, s. 2, if any person shall wilfully discharge, or attempt to discharge, or point, aim, or present, at or near to the person of the Queen, any fire arms, whether the same shall or shall not contain any explosive or destructive material, or shall wilfully strike, or attempt to strike at the person of the Queen, with any weapon or in any other manner whatsoever, or shall wilfully throw, or attempt to throw any substance, matter, or thing at or upon the person of the Queen, with intent to injure the person of the Queen, or to break the public peace, or shall, near to the person of the Queen, wilfully produce or have any gun, or other fire arms or dangerous matter, with intent to use the same to injure the person of the Queen, or to alarm her Majesty, every such person so offending shall be guilty of a high misdemeanour, and be transported for seven years, or imprisoned for not more than three years, and whipped three times.

*Counterfeiting English gold or silver coin.*—By the 2 Will. 4, c. 34, s. 3, if any person shall falsely make or counterfeit any coin to resemble or pass for any of the King's current gold or silver coin, every such offender shall be guilty of felony. The punishment is transportation for life, or for any term not less than seven years; or imprisonment for any term not exceeding four years.

*Colouring coin.*—By the 2 Will. 4, c. 34, s. 4, if

any person shall gild or silver, or shall wash, colour, or case over any coin resembling any of the King's current gold or silver coin, he shall be subject to the same punishment as just mentioned. The same punishment is inflicted for *impairing* the gold and silver coin, with intent, &c. So for buying or importing counterfeit coin. Counterfeiting *copper* coin is punishable by transportation for not more than seven years, or imprisonment for two years.

*Uttering counterfeit coin.*—Tendering, uttering, or putting off any false coin, resembling the King's gold or silver coin, with a guilty knowledge, is, by 2 Will. 4, c. 34, s. 7, a misdemeanor, and punishable by imprisonment for any term not exceeding one year. The second offence is a felony.

Tendering and uttering, &c., knowingly, any false coin resembling copper coin, or having in possession, knowingly, and with intent to utter the same, three or more pieces of such false copper coin, is by 2 Will 4, c. 34, ss. 12, 19, a misdemeanor, and punishable by imprisonment for any term not exceeding one year.

*Counterfeiting foreign coin.*—By the 37 Geo. 3. c. 126, s. 2, if any person shall counterfeit any kind of coin, not the proper coin of this realm, nor permitted to be current within the same, but resembling any gold or silver coin of any foreign prince, &c., such person shall be deemed guilty of felony, and be punished by transportation for any term of years, not exceeding seven years. The same punishment is inflicted for importing counterfeit foreign coin.

Counterfeiting any coin resembling foreign copper coin of less value than silver coin, or intended to resemble such coin, is punished by 43 Geo. 3,

c. 139, s. 3, for the first offence, imprisonment for any term not exceeding one year; for the second offence, transportation for seven years.

Uttering, tendering in payment, or giving in exchange, any false coin designed to resemble the coin of a foreign prince or country, or to pass as such, is by 37 Geo. 3, c. 126, s. 4, for the first offence, imprisonment for six months, and to find sureties for six months more; for the second offence, imprisonment for two years, and to find sureties for two years more. The third offence is felony.

*Felonies against the King's council.*—The 3 Hen. 7, c. 14, as to killing, and the 9 Anne, c. 16, as to assaulting a privy counsellor, are repealed by 9 Geo. 4, c. 31, which makes all attempts to kill capital offences.

*Serving foreign states.*—By 3 Jac. 1, c. 4, to go out of the realm into the service of a foreign prince, without taking the oaths of allegiance, &c., is felony.

By the 59 Geo. 3, c. 69, the offences of accepting a military commission without authority; of entering a foreign service as soldier, sailor, or marine; of making an engagement for such a purpose; of hiring others to so enlist or serve; of equipping vessels for such purposes; of issuing commissions for such vessels; and of adding guns to a foreign vessel, when in a port of the United Kingdom, are declared to be misdemeanors, and punishable by fine or imprisonment, or both.

*Embezzling stores.*—That part of the 4 Geo. 4, c. 53, which is left unrepealed by the 7 & 8 Geo. 4, c. 27, s. 1, makes it felony for any person to

steal or embezzle her Majesty's ammunition, sails, cordage, naval and military stores; or of being accessory to any such offence. The punishment is transportation for life, or for not less than seven years; or to be imprisoned, with or without hard labour, for not more than seven years.

*Burning ships.*—By 12 Geo. 3, c. 24, to set on fire and burn, or otherwise to destroy, any of his Majesty's ships or vessels of war, whether on float, or building in any dock-yard or private yard, is felony, punishable with death. See 7 & 8 Geo. 4, c. 28, ss. 6, 7.

*Desertion.*—The offences of deserting, or inducing to desert, are provided for by the annual mutiny acts, which make it a misdemeanor for every person who shall, in any part of her Majesty's dominions, directly or indirectly, persuade any soldier to desert; punishable by fine or imprisonment, or both, as the court shall adjudge. See also 1 Geo. 1, c. 47; 37 Geo. 3, c. 70.

*Oaths, unlawful.*—By the 37 Geo. 3, c. 123, any person who shall administer, or be aiding at, or consenting to the administering or taking of any oath or like engagement, binding, or purporting to bind, a party to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association formed for any such purpose, or to obey the orders or commands of any committee, or of any leader or commander, or other person not having authority by law for that purpose, or not to inform or give evidence against any associate, or not to reveal or discover any unlawful combination, or any illegal act or illegal oath or engagement, shall be guilty of felony, and be trans-

ported for seven years; other provisions are made by the 39 Geo. 3, c. 79 (amended by 2 & 3 Vict. c. 12), and 57 Geo. 3, c. 19, s. 25, by which societies of which the members shall take any oath or engagement not required by law, or shall comprise members the names whereof shall be unknown to the society at large, or consist of different branches, or elect committees or delegates, are to be deemed unlawful combinations, and the members may be transported for seven years, or imprisoned for two years; or a justice may fine to the extent of £20, and not less than £5, or imprison for three months.

*Oaths to commit treason or felony.*—By the 52 Geo. 3, c. 104, every person who shall administer, or be assisting at the administering of any oath or engagement, purporting to bind the person taking the same to commit any treason or murder, or any capital felony, shall be guilty of felony, and is subject by 1 Vict. c. 91, to transportation for life, or for not less than fifteen years; or imprisonment for not more than three years, with or without hard labour, and solitary confinement. And every person taking any such oath or engagement, not being compelled thereto, shall be guilty of felony, and be subject to transportation for life, or for such term of years as the court shall adjudge.

*Præmunires.*] — Præmunire was an offence whereby the papal authority was encouraged and promoted in diminution of the authority of the Crown, and derives its name from the word “forewarn” in the writ by which the punishment was inflicted—viz., to be put out of the King’s protection, their lands and goods forfeited to the King’s use, and their bodies attached to answer the King

and his council. The pains of *præmunire* being of no inconsiderable consequence, they were extended, by subsequent statutes, to offences that had very little relation to that from whence the name is derived. There is no modern instance of a prosecution for a *præmunire*, and it is therefore unnecessary to do more than refer the reader to 4 Black. Com. chap. 8, for an admirable account of this offence and its punishment.

*Misprisions of treason and felony.*]—Misprisions, from *mespris*, neglect or contempt, are generally understood to be all such high offences as are under the degree of capital treason, but nearly bordering thereon. A misprision is contained in every treason and felony; and the King may proceed against the offender for the misprision only. Misprisions may be either by omission or commission. By omission, where a person knows that another hath committed treason or felony of any kind, and does not reveal it; by commission, as in contempts and high misdemeanors; as by the maladministration of such officers as are in public trust and employment; neglecting to join the *posse comitatûs* when required by the sheriff or justices, according to the 2 Hen. 5, c. 8; speaking or writing against the King or his Government; denying, by heedless discourse, his right to the Crown; striking in the King's palaces, or courts of justice; rescuing a prisoner from any court; dissuading a witness from giving his evidence, and the like.



## CHAP. XLI.

## OFFENCES AGAINST PUBLIC JUSTICE.

[4 Black. Com. ch. 10; 4 Steph. Com. chap. 9.]

*Records.*—Stealing, or for any fraudulent purpose taking from its place of deposit for the time being, or unlawfully and maliciously obliterating, injuring, or destroying any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever, of any court of record, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever, of a court of equity, is a misdemeanor by 7 & 8 Geo. 4, c. 29, s. 21, and punishable by transportation for seven years, or fine or imprisonment, or both, by 1 & 2 Vic. c. 94, s. 19. Persons belonging to or employed in the Public Record Office certifying any writing as a true and authentic copy of a record in the custody of the Master of the Rolls, knowing the same to be false in any material part, are guilty of felony, and punishable with transportation for life, or for not less than seven years; or imprisonment for four years. By 7 & 8 Vic. c. 19, s. 5, provisions are made for forgery or other abuse of proceedings in the new county courts.

*Personating bail.*—By the 1 Wil. 4, c. 66, s. 11, if any person shall acknowledge any recognizance or bail in the name of any other person not consenting to the same, or shall, in the name of any other person not consenting to the same, acknowledge any fine or recovery, *cognovit actionem*, or judgment, or any deed to be enrolled, he shall be guilty of felony, and be subject to transportation for life, or for not less than seven years; or imprisonment for not more than four nor less than two years.

*Obstructing process.*—To obstruct an arrest upon criminal process makes the offender a *particeps criminis*; and by 8 & 9 Will. 3, c. 27, 9 Geo. 1, c. 28, 11 Geo. 1, c. 22, and 1 Geo. 4, c. 116, to oppose the execution of any process in any pretended privileged place within the bills of mortality, is felony, and liable to seven years' transportation. By 9 Geo. 4, c. 31, s. 25, assaulting any peace officer or revenue officer, in the due execution of his duty, or any person acting in aid of such officer; or assaulting any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, is a misdemeanor, punishable with imprisonment, with or without hard labour, for two years; also fine, and sureties to keep the peace. By the 1 Vic. c. 85, s. 4, whosoever unlawfully and maliciously shall shoot at any person, or in any manner attempt to discharge any kind of loaded arms at any person, or shall stab, cut, or wound any person with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and subject to transportation for life, or for not less than fifteen years; or imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement.

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*Escape.*—Officers who, after arrest, *negligently* permit a felon to escape, are punishable by fine; but if an officer *voluntarily* suffer a felon to escape, he becomes guilty of the same crime for which the felon was in custody. There are some statutes applying to escapes from Pentonville, Milbank, and Parkhurst prisons.

*Breaking prison.*—To break prison when lawfully committed for any treason or felony, is felony, and punishable with transportation for seven years, or imprisonment for two years; and when confined on any inferior charge, is a misdemeanour, punishable by fine and imprisonment.

*Rescue.*—To rescue a person apprehended for felony, is felony; for treason, treason; and for a misdemeanor, a misdemeanor. By 25 Geo. 2, c. 37 (altered by 1 Vic. c. 91), to rescue or attempt to rescue any person committed for murder, or for any of the offences enumerated in the 27 Geo. 2, c. 15, or 9 Geo. 1, c. 22, is felony, punishable with transportation for life, or not less than fifteen years; or imprisonment for three years. There are some other statutes, particularly 1 & 2 Geo. 4, c. 88; 4 Geo. 4, c. 64, s. 43; 5 Geo. 4, c. 84; 5 Vic. c. 29, s. 24; 6 & 7 Vic. c. 76, s. 22.

*Returning from transportation.*—By 5 Geo. 4, c. 84 (amended by 4 & 5 Will. 4, c. 67), if any offender ordered to be transported or banished, shall return into any part of her Majesty's dominions, without some lawful cause, before the end of the term for which he was transported, he is liable to transportation for life, and previous imprisonment for four years.

*Rewards for stolen property.*—Theftbote is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute, and was punishable by the common law with fine and imprisonment. By 7 & 8 Geo. 4, c. 29, s. 59, to advertise a reward for the return of things stolen, with no questions asked, subjects the advertiser and printer to a forfeiture of fifty pounds each. By s. 58 of the same statute, to take a reward, under pretence of helping any one to stolen goods, money, &c., makes the offender guilty of felony, unless he cause the offender to be apprehended and brought to trial, and shall also give evidence against him: the punishment is transportation for life, or not less than seven years, or imprisonment for four years, with whipping, if ordered.

*Receiving stolen goods.*—This offence is only a misdemeanor at common law. But by 7 & 8 Geo. 4, c. 29, s. 54, if any person shall knowingly receive any chattel, money, or valuable security, or other property whatsoever, the stealing or taking whereof shall amount to felony, either by common law, or by virtue of that act, every such receiver shall be guilty of felony, and be indicted either as an accessory after the fact, or for a substantive felony; and, however convicted, shall be liable, at the discretion of the court, to be transported for a term not exceeding fourteen years, nor less than seven years, or imprisonment (with or without hard labour and solitary confinement) for a term not exceeding three years; and, if a male, to be once, twice, or thrice whipped, if the court think fit, in addition to the imprisonment. By s. 55, if any person shall knowingly receive any chattel, money, valuable security, or other property whatever, the stealing, taking,

obtaining, or converting whereof is made an indictable misdemeanor by the act, such receiver shall be guilty of a misdemeanor, and transported for seven years, or imprisoned (with or without hard labour and solitary confinement) for not more than two years; and, if a male, once, twice, or thrice whipped, if the court think fit, in addition to the imprisonment. And by s. 60, where the stealing of any property whatever is punishable by that act on summary conviction, either for every offence, or for the first and second offences only, or for the first offence only, the guilty receiver shall be liable, for every first, second, or subsequent offence of receiving, to the forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by the said act made liable.

*Barratry.*—Barratry is the offence of frequently exciting and stirring up suits and quarrels between her Majesty's subjects, either at law or otherwise; the punishment of which is by fine, imprisonment, and surety for future good behaviour. If the party convicted shall practise as an attorney, the court may summarily try him, and sentence him to transportation for seven years. As to suing in the name of a fictitious plaintiff in inferior courts, the offender may be indicted at the sessions, and the imprisonment is, by 8 Eliz. c. 2, six months, and treble damages to the party injured.

*Maintenance.*—Maintenance is a taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. Maintenance is, 1, *ruralis*, or in the country; as where one assists another in his pretensions to certain lands, by taking or holding the possession of them from him by force

or subtlety; or where one stirs up quarrels and suits in the country, in relation to matters wherein he is no way concerned: and this kind of maintenance is punishable by fine and imprisonment. 2, *curialis*, or in a court of justice, where one officiously intermeddles in a suit depending in any such court, which no way belongs to him, by assisting either party with money or otherwise in the prosecution or defence of any such suit; and this is also punishable by the common law by fine and imprisonment, to which the statute 32 Hen. 8, c. 9 has added a forfeiture of ten pounds.

*Champerty.*—Champerty is a species of maintenance, and punished in the same manner, being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expence.

*Compounding informations.*—By 18 Eliz. c. 5 (as affected by 56 Geo. 3, c. 138), if any person, informing under pretence of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him, he shall forfeit ten pounds, and suffer such imprisonment or additional fine as shall be fixed, and be for ever disabled to sue on any popular or penal statute.

*Conspiracy.*—Conspiracy, taken generally, is a combination or agreement between several persons to carry into effect a purpose hurtful to some individual, or to particular classes, or to the public at large; strictly taken, it is an agreement betwixt two or more to indict an innocent man falsely and

maliciously, without any probable cause, who is accordingly indicted, and afterwards lawfully acquitted or discharged. The party grieved may in this case punish the offenders (for there must be two at least to form a conspiracy) by indictment.

*Perjury.*—Perjury is defined to be a crime committed by wilful false swearing in any judicial proceeding, in a matter material to the issue or point in question, on a lawful oath, or declaration in the nature of an oath, administered by some person of competent authority. Subornation of perjury is the offence of procuring another to take such false oath or declaration as constitutes perjury in the principal. The punishment for these offences is fine and imprisonment. By 5 Eliz. c. 9, whoever shall procure another to commit wilful and corrupt perjury shall forfeit forty pounds, or suffer one year's imprisonment. And by 2 Geo. 2, c. 25, the offender may be sent to some house of correction, or transported for seven years. To constitute perjury, the falsehood of the oath must be wilful, from a perverse mind and deliberate intention, and not happening through unavoidable haste, inadvertency, or weakness. The oath must be administered by some person having competent authority for that purpose; for all extra-judicial oaths are illegal; and although a person may be foresworn, he cannot be perjured; and therefore it must also be in some judicial proceeding. It need not, however, be absolute; for a man may be perjured in swearing that he *thinks* or *believes* a fact to be true which he must know to be false; but the fact must be in some degree *material*, or no injury is done; and if it be material, it is of no consequence whether it be believed or not.

*Bribery.*—Bribery is where a judge or other person concerned in the administration of justice takes any undue reward to influence his behaviour in his office. There are various statutes against bribery at parliamentary and municipal elections, and of excise and custom-house officers, the officers of the court of chancery, and of the court of bankruptcy, &c.

*Embracery.*—Embracery is an attempt to influence a jury corruptly to one side, by promises, persuasions, entreaties, money, entertainment, or the like ; for which both parties may be fined and imprisoned.

*Extortion.*—Extortion, in a large sense, signifies any oppression under colour of right ; but in a strict sense, it is the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due. It is punishable by fine and imprisonment, and sometimes a forfeiture of the office.



## CHAP. XLII.

## OFFENCES AGAINST THE PUBLIC PEACE.

[See 4 Black. Com. ch. 10; 4 Steph. Com. ch. 10.]

*Riots, routs, and unlawful assemblies.*—A riot is a tumultuous disturbance of the peace, by three persons or more assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful.—A rout is a disturbance of the peace, by persons assembling together with an intention to do a thing, which if it be executed will make them rioters, and actually making a motion towards the execution thereof.—An unlawful assembly is a disturbance of the peace, by persons barely assembling together with an intention to do a thing, which if it were executed would make them rioters, but neither actually executing it, nor making a motion towards the execution of it; and, indeed, any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the

king's subjects, seems to be an unlawful assembly. These offences are in general punished by fine and imprisonment, and hard labour may be superadded.

By 1 Geo. 1, c. 5 (called the Riot Act), if any twelve persons are unlawfully assembled, to the disturbance of the public peace, and any one justice of the peace, sheriff, under sheriff, or mayor of a town shall think proper to command them by proclamation to disperse, and they contemn his orders, and continue together for one hour afterwards, such contempt is felony, punishable by transportation for life, or not less than fifteen years, or imprisonment for three years (1 Vic. c. 91). By sect. 2, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading it, such opposers and hinderers are felons, and liable to the same punishment.

*Demolishing buildings.*—By 7 & 8 Geo. 4, c. 30, s. 8 (see 4 & 5 Vic. c. 56, s. 2, and 6 & 7 Vic. c. 70), if any persons, unlawfully and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully, and with force, demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any church or chapel, or any house or other such buildings, or machinery as in the act mentioned, they shall be adjudged felons, and may be transported for life, or for not less than seven years, or imprisoned for three years.

By 7 & 8 Geo. 4, c. 31, ss. 2, 3, if any church, chapel, house, or other buildings or machinery, including (by 2 & 3 Will. 4, c. 72) threshing machines, and, by 10 Vict. c. 90, ships and cargoes, shall be *feloniously* demolished, wholly or in part by rioters, the hundred must make compensation, provided the owner, within seven days, goes before a magistrate, and states the circumstances, &c., and sues within

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three months (a). If the damage does not exceed £30, a summary application may be made for compensation to the justices at a special petty sessions.

*Tumultuous petitioners.*—By 13 Car. 2, c. 5, not more than twenty names shall be signed to any petition to the king, or either house of parliament, for any alteration in church or state, unless signed by three justices, or the majority of the grand jury, or, in London, by the lord mayor, aldermen, and common council. This statute is not regarded in practice; but the 57 Geo. 3, c. 19, s. 23, against the assembling of more than fifty persons within one mile of Westminster Hall, while parliament or the courts are sitting, for preparing petitions, has been lately acted on.

*Threatening letters.*—By 4 Geo. 4, c. 54, s. 3, knowingly to send any letter or writing, threatening to kill or murder any of his Majesty's subjects, or to burn or destroy their houses, outhouses, barns, stacks of corn or grain, hay or straw, is felony, and punishable with transportation for life, or for not less than seven years.

*Unlawful hunting.*—By 7 & 8 Geo. 4, c. 29, s. 26, hunting in the enclosed part of any forest is felony, and punishable as a larceny; if in an unenclosed part, it is punishable by fine for the first offence.

*Affrays.*—Affrays, from *affraier*, to terrify, are the fighting of two or more persons, in some public place, to the terror of her majesty's subjects; for if the fighting be in private, it is no affray, but an assault. Affrays may be suppressed by any private person present; but the constable, who is bound to keep the peace, may break open doors to suppress

an affray, or apprehend the affrayers. The punishment for common affrays is by fine and imprisonment.

*Forcible entry or detainer.*—At the common law, a man disseised of lands or tenements might lawfully regain possession by force, unless his right of entry was gone by neglecting to enter in proper time; but this being found by experience to be very prejudicial to the public peace, it was thought necessary to restrain all persons from the use of such violent methods of doing themselves justice, so that the only entry now allowed by law is a peaceable one. By 5 Rich. 2, c. 8, all forcible entries are punished with imprisonment and ransom. And by 8 Hen. 6, c. 9, 31 Eliz. c. 11, and 21 Jac. 1, c. 15, upon any forcible entry, or forcible detainer after peaceable entry, a justice of the peace may record the force on his own view, and commit the offender, or may summon a jury to try the fact, and restore the possession.

*Riding armed.*—By 2 Edw. 3, c. 3, no man, great or small, shall go or ride armed, by night or by day, with dangerous or unusual weapons, terrifying the good people of the land.

*False news.*—Spreading false news, to make discord between the king and nobility, or concerning any great man in the realm, is punishable by fine and imprisonment.

*False prophecies.*—The 5 Eliz. c. 15 ordains, that if any person do advisedly and directly advance, publish, and set forth, by writing or open speech or deed, any fond, fantastical, or false prophecy, to the intent to make rebellion or disturbance in the realm,

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he shall pay a fine of £10, and suffer a year's imprisonment, for the first offence; and forfeit, for the second, all his goods and chattels, and suffer imprisonment for life.

*Challenges.*—A challenge to fight, although not an actual breach of the peace, yet, as it tends to provoke and excite others to break it, is an indictable offence, and punishable by fine and imprisonment. \*

*Seditious and malicious libels.*—Libels against the person and government of the queen are high misdemeanors at common law. So are libels against either house of parliament, against the constitution, or the administration of justice. And by the 60 G. 3, and 1 G. 4, c. 8, ss. 1, 4, an increased penalty is enacted against a person, on second conviction, for composing, publishing, or printing seditious libels against the sovereign, the regent, the government, the constitution in church or state, or either house of parliament, namely, fine and imprisonment, and also infamous corporal punishment.

By the 6 & 7 Vic. c. 96 (amended by the 8 & 9 Vic. c. 75), any person publishing or threatening to publish any libel upon any other person, or to abstain from printing or publishing, or to prevent the printing or publishing of any matter or thing touching any other person, with intent to extort any money, &c., or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, shall be liable to imprisonment, with or without hard labour, for three years. By s. 4, the publication, knowingly, of any false or defamatory libel is punishable by imprisonment for two years, and fine. By s. 5, publishing a defamatory libel, though not known to be false, is punishable by imprisonment for one year and a fine.

## CHAP. XLIII.

## OFFENCES AGAINST PUBLIC TRADE.

[See 4 Black. Com. chap. 12; 4 Steph. Com. chap. 11.]

*Owling.*—Owling was the offence of transporting (usually by night) wool or sheep out of the kingdom, to the detriment of its staple manufacture. The 28 Geo. 3, c. 28 repealed all the previous statutes, and this is now no offence.

*Smuggling.*—Smuggling is the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise. Certain open, daring, and avowed practices of smuggling are made felonies by statute: they are the following,—Assembling armed to assist in smuggling, which is punishable, by 8 & 9 Vic. c. 87, with transportation for life, or not less than fifteen years; or imprisonment for not exceeding three years, with or without hard labour, and with or without solitary confinement. By s. 64, maliciously shooting at any revenue boat, or shooting, &c., any revenue officer, is subject to the same punishment. And by s. 66, to assault revenue officers, &c., is punishable with transportation for seven years, or imprisonment for three

years. By 9 Geo. 4, c. 31, s. 25, this may be treated as a misdemeanor, and is then punishable by imprisonment for two years, with a fine, and to find sureties. By the 8 & 9 Vic. c. 87, if any person, being in company with more than four other persons, be found with any goods liable to forfeiture, or in company with one other person, within five miles of the sea coast, or of any navigable river leading therefrom, with such goods, and carrying offensive arms or weapons, or disguised in any way, he shall be guilty of felony, and be transported for seven years.

*Usury.*—Usury, *usus aris*, is the gain of any thing by contract, above the principal or thing lent, exacted only in consideration of the loan of it, or for the forbearance of the demand of it; but according to the modern acceptance, it is “an unlawful contract upon the loan of money, to receive the same again with exorbitant increase.” We have already noticed the provisions of some modern statutes, which, in most cases, allow the lender to take any rate of interest he can get (*a*).

*Procuracion money.*—By 12 Anne, st. 2, c. 16, if any scrivener or broker take more than five shillings per cent. procuracion money, or more than twelve pence for making a bond, he shall forfeit twenty pounds, with costs, and shall suffer imprisonment for half a year. By 53 Geo. 3, c. 141, s. 8, taking more than ten shillings per cent. for procuring money to be advanced for a life annuity, is punishable with fine and imprisonment.

*Cheating* ]—Cheating, as it was understood at common law, may in general be described to be deceitful practices, in defrauding another of his known right, by means of some artful contrivance,

of a nature to affect the public interest, and so subtle and concealed, that the common prudence and caution of mankind is not sufficient to elude the effect of it. But there being many species of fraud which could not, in strictness of law, be comprehended within this definition, it is provided by 7 & 8 Geo. 4, c. 29, s. 53, that if any person shall, by any false pretences, obtain from any other person any chattel, money, or valuable security, with intent to defraud any person of the same, he shall be transported for seven years, or be imprisoned, or fined, or both.

*Frauds by bankrupts and insolvents.*]—By 5 & 6 Vic. c. 122, s. 32, if a bankrupt do not duly surrender, or, upon examination (which is not now on oath, 8 & 9 Vic. c. 41), do not discover all his estate, and all books, &c., or do not duly deliver same up, or if he remove, conceal, or embezzle any part of the estate to the value of £10, or any books, &c., with intent to defraud his creditors, he is guilty of felony, and liable to transportation for life, or not less than seven years, or imprisonment for not more than seven years. So it is a misdemeanor (s. 34), if he have, after an act of bankruptcy, or in contemplation thereof, destroyed or altered his books, &c., or have obtained goods on credit, or disposed of them with intent to defraud creditors, within three months previous to bankruptcy (s. 35). As to *Insolvents*, it is, by 1 & 2 Vic. c. 110, s. 99, a misdemeanor, punishable with imprisonment for three years, to fraudulently omit from his schedule any effects, &c., or to retain the same. And the same is enacted by 7 & 8 Vic. c. 96, as to insolvent petitioners (*b*).

*Monopolising.*]—A monopoly is an allowance by



the king to any person of the sole buying, selling, making, working, or using of any thing, and only differs from engrossing (the statutes relative to which are repealed) in this, that the one is by patent from the king, and the other is the act of the subject. By 24 Jac. 1, c. 1, all monopolies are declared contrary to law, and void, except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions, of which we have before spoken (p. 232). The offences of *forestalling* and *regrating* are abolished by the 7 & 8 Vic. c. 24.

*Apprenticeships.*—By 5 Eliz. c. 4, to exercise a trade in any town, without having previously served as an apprentice for seven years, incurred a penalty of forty shillings by the month; but this restriction is now done away by 5 & 6 Will. 4. c. 76, s. 14.

*Seducing artificers.*—Formerly, to seduce or entice any artificers to go out of Great Britain into any foreign country, or to export certain tools, &c., incurred a penalty; but these penalties and restrictions no longer exist (5 Geo. 4, c. 97; 6 & 7 Vic. c. 84.)

## CHAP. XLIV.

OFFENCES AGAINST THE PUBLIC HEALTH,  
POLICE, OR ECONOMY.

[See 4 Black. Com. chap. 18; 4 Steph. Com. chap. 12.]

*Quarantine.*—The 1 Jac. 1, c. 31, as to persons infected with the plague, or dwelling in any infected house, is repealed by 1 Vic. c. 91, s. 4. By 6 Geo. 4, c. 78, persons arriving from infected places, and not performing quarantine in the manner described by these acts, or escaping from quarantine, are liable to punishment by fine and imprisonment, and the officer of the customs deserting his duty, or permitting unauthorised departure, is subject to transportation or imprisonment.

*Clandestine marriage.*—By 4 Geo. 4, c. 76, s. 21, to solemnize marriage in any other place besides a church, or without due publication of banns, or license, or under pretence of being in holy orders, subjects the persons solemnising it to transportation for seven years, or imprisonment for two years. However, as we have seen (p. 119), by the 6 & 7 Will. 4, c. 85, amended by 3 & 4 Vic. c. 72, marriages may take place in certified registered dissent-

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ing chapels, and even at the office and in the presence of the superintendent registrar, or district registrar, of marriages. Unduly solemnising marriages, or issuing any false certificates or licenses, is punishable as above stated.

By 4 Geo. 4, c. 76, s. 29, to insert in any register any false entry of any matter or thing relating to any marriage, or to make, alter, forge, or counterfeit any such entry in such register, or any such marriage license, or to destroy any register book of marriage, subjects the party to transportation for life.

*Bigamy.*]—Polygamy, or, as it is corruptly called, bigamy, is another felonious offence with regard to matrimony. By 9 Geo. 4, c. 31, s. 22, if any person, being married, do marry any other person, the former husband or wife being alive, he or she shall be guilty of felony, and be liable to transportation for seven years, or imprisonment for two years. But it is provided, that this penalty shall not extend to the following cases:—1, Where the second marriage is not by a subject, *and* is performed out of England; 2, Where the husband or wife shall absent him or herself the one from the other by the space of seven years together, the one of them not knowing the other to be living within that time; 3, Where the party shall, at the time of the second marriage, have been delivered from the bond of the first marriage; 4, Where, at the time of such marriage, the former marriage shall have been declared null and void by the competent court.

*Common nuisances.*]—A common nuisance may be defined to be an offence against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a

thing which the common good requires. All annoyances in highways, bridges, and public rivers, either by obstruction or for want of repair, are nuisances. So is the carrying on of offensive or dangerous trades or manufactures. All disorderly inns, ale houses, bawdy houses, gaming houses, stage plays unlicensed, and booths for rope dancers, are nuisances. Eaves-droppers and common scolds are public nuisances. By the 9 & 10 Vic. c. 96, power is given to town councils of boroughs, or paving, &c., commissioners, or guardians of the poor, to lay a complaint before two justices of the peace of the filthy or unwholesome condition of any dwelling-house or other building, or of the accumulation of any offensive or noxious matter, or of the existence of any foul drain, &c.; whereupon the justice may make an order for the cleansing, &c., or for the removal of the nuisance.

*Vagrants.*—By 5 Geo. 4, c. 83 (amended by 1 & 2 Vic. c. 38), vagrants are divided into three classes:—1st, Idle and disorderly persons, who are punishable with one month's imprisonment in the house of correction, with hard labour; 2dly, Rogues and vagabonds, who are punishable with imprisonment, not exceeding six months, with hard labour; 3dly, Incurable rogues, who may be committed to the next session, and kept to hard labour in the mean time. The sessions may imprison him, with hard labour, for one year, with whipping.

*Gaming.*—Gaming is not restrained by the common law, unless it is so practised as to become injurious to the public economy; but the legislature has, in many instances, laid it under particular restraints. A wager or bet is a contract entered into, without colour or fraud, between two or more persons, for a good consideration, and upon mutual

promises to pay a stipulated sum of money, or to deliver some other thing to each other, according as some prefixed and equally uncertain contingency shall happen within the terms upon which the contract is made. By the 8 & 9 Vic. c. 109, s. 18, no proceedings can be had to recover a wager, or deposit with a stakeholder (*a*).

Common gamblers, who conspire with false dice to cheat the king's subjects, may be indicted for such offence. By 33 Hen. 8, c. 9, s. 11 (repealed by 8 & 9 Vic. c. 109, as to bowling, tennis, or other games of mere skill), no person, of what degree, quality, or condition soever, shall by himself or agent, for his gain, lucre, or living, keep any house or place for playing at any game prohibited by any statute, or any new unlawful game afterwards invented, on pain of forty shillings a day, and 6s. 8d. for every person frequenting such gaming-house. By 8 & 9 Vic. c. 109, the owner or keeper, &c., of any common gaming house, shall, on conviction before two justices, be liable, in addition to the penalties of 33 Hen. 8, c. 9, to pay a penalty of not more than £100, or to be imprisoned for six months; or the party may be indicted. Provisions are made for licensing billiard tables, and severe penalties inflicted for keeping unlicensed tables, or allowing play between one and eight in the morning, or on any holy day. And every person who shall, by fraud in play or betting, win any money, &c., shall be punished as for a false pretence.

By 10 & 11 Will. 3, c. 17, and 6 Geo. 4, c. 60, all pretended lotteries are suppressed. However, *art unions* are legalised by 8 & 9 Vic. c. 57.

The making, selling, and firing squibs and other *fireworks* is a common nuisance, and punishable by fine; and there are statutes regulating the making and conveying of gunpowder.

*Game.*]—By 9 Geo. 4, c. 69 (extended by 7 & 8 Vic. c. 29) if any person shall, by night (which commences at the expiration of one hour after sunset, and concludes at the beginning of the last hour before sunrise) unlawfully take or destroy any game or rabbits in any land, or any public road or path, or the sides, openings, &c., thereof, or shall by night be in such place with any gun, net, engine, &c., for the purpose of taking or destroying game, he shall be imprisoned, for the first offence, for three months, with hard labour, and find sureties; for a second offence he is to be imprisoned for six months, and to find sureties; for a third offence, he may be transported for seven years, or be imprisoned for two years. So, unlawfully entering such lands or road, by night, to the number of three or more together, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun or other offensive weapon, subjects a party to transportation for fourteen years, and not less than seven years, or imprisonment with hard labour for three years.

## CHAP. XLV.

## OFFENCES AGAINST THE PERSON.

[See 4 Black. Com. chaps. 14, 15; 4 Steph. Com. chap. 4.]

*Homicide.*—Homicide, or the killing of any human creature, is of three kinds: justifiable, excusable, and felonious.

*Justifiable homicide.*—Justifiable homicide has no share of guilt at all, as it must be occasioned by some unavoidable necessity, and without any inadvertence or negligence in the party killing; as by virtue of such an office as obliges one in the execution of public justice to put a malefactor to death, who has forfeited his life by the laws and verdict of his country; or where an officer in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him; or for the prevention of any forcible or atrocious crime.

*Excusable homicide.*—Excusable homicide is either *per infortunium*, by misadventure; or *se defendendo*, in self defence. Homicide *per infortunium* is where a man, doing a lawful act, without any intention to hurt, unfortunately kills another;

as where a man is at work with a hatchet, and the head thereof flies off, and kills a bystander. Homicide *se defendendo*, is where a man, to protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, happens to kill him who assaults him; and this is frequently called chance medley, as proceeding from a casual affray. To excuse this species of homicide, it must appear that the slayer had no possible means of escaping from his assailant. By the 9 Geo. 4, c. 31, s. 10, no punishment or forfeiture is incurred by any person who kills another by misfortune or in his own defence, or in any other manner without felony. So that all practical distinction between justifiable and excusable homicide is now done away with, except, indeed, as to actions for compensation under the 9 & 10 Vic. c. 93.

Felonious homicide is the killing of a human creature, of any age or sex, without justification or excuse, and consists either in self-murder, manslaughter, or murder.

*Self-murder.*—A *felo de se* is he that deliberately puts an end to his existence, or commits any unlawful malicious act, the consequence of which is his own death. The party must be of years of discretion, and in his senses, else it is no crime. The punishment for this offence is burial without Christian rites; and all his goods and chattels are forfeited to the king.

*Manslaughter.*—Manslaughter arises from the sudden heat of the passions, and is defined to be the unlawful killing of another without malice, either express or implied. The offence may be committed either on a sudden quarrel, as if upon a sudden quarrel two persons fight, and one of them kill



the other; or in the commission of an unlawful act, as if two persons play at sword and buckler, unless by the king's command, and one of them kill the other. As it must be done without premeditation, or any deliberate intention of doing mischief, there can be no accessaries to this offence before the fact. The punishment for manslaughter is, by 9 Geo. 4, c. 31, s. 9, transportation for life, or for not less than seven years, or imprisonment for not more than four years, and to pay a fine.

*Murder.*—Murder arises from the deliberate wickedness of the heart, and is defined to be “when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied.”

Malice is the greatest criterion by which murder is distinguished from every other kind of homicide; for, as we have already shown, homicide may be founded in the dispensations of public justice, occasioned by mere accident, done for self-preservation, arise from a sudden transport of passion, or, lastly, be committed in malice. Express malice is that deliberate intention to take away the life of a fellow creature which is manifested by external circumstances capable of proof; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. Implied malice is that inference which arises from the nature of the act, though no particular malice can be proved; as when a man suddenly kills another without any apparent provocation; when he gives poison to another without any known inducement; when he wilfully suffers a beast, notoriously mischievous, to wander abroad, and it kills a man. The punishment of murder and manslaughter was formerly

the same; but now, by 9 Geo. 4, c. 31, s. 3, every person convicted of murder shall suffer death as a felon.

*Compensation for accidental killing.*]—Before quitting the subject of homicide, it is necessary to notice the 9 & 10 Vic. c. 93, which is an act for compensating the families of persons killed by accidents. The act, after reciting that no action at law was maintainable against a person, who by his wrongful act, neglect, or default, may have caused the death of another person, and that it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him, enacts, “That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.” The jury may give such damages as they may think proportioned to the injury resulting from such death to the parties to be benefited; the amount recovered, after deducting costs not recovered from the defendant, is to be divided amongst the aforesaid relations in such shares as the jury by their verdict shall find and direct.

*Attempts to murder.*]—By 1 Vic. c. 85, s. 2, whosoever shall administer or cause to be taken by any person any poison or other destructive thing, or

shall stab, cut, or wound any person, or shall by any means cause to any person any bodily injury dangerous to life, with intent, in any of such cases, to commit murder, shall be guilty of felony, and shall suffer death. And by s. 3, whosoever shall attempt to administer to any person any poison or other destructive thing, or shall shoot at any person, or shall, by drawing any trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of such cases, to commit murder, shall, although no bodily injury be effected, be guilty of felony, and shall be liable to be transported for life, or for fifteen years, or to be imprisoned for three years.

*Mayhem.*]—Mayhem is the depriving another of the use of such of his members as may be useful to him in fight; and, as we have already mentioned it as a civil injury, we shall only say here that the law considers it an atrocious breach of the peace, for which the offender may be punished by fine and imprisonment. By the statute law, however, specific provisions were made against the offence of maiming, cutting off, or disabling a limb or member, particularly by the 37 Hen. 8, c. 6, and 22 & 23 Car. 2, c. 1 (called the Coventry Act), which are now, however, repealed by the 7 Will. 4 and 1 Vic. c. 85. By this statute, discharging loaded arms, stabbing, cutting, or wounding any person, with intent to maim, &c., or to do him bodily harm, or to resist apprehension, is felony; and the party is subject to transportation for life, or fifteen years, or imprisonment for three years. So, sending any explosive, &c., substances, or casting, &c., upon any one any corrosive fluid, with intent to burn, maim,

&c., and whereby any person shall be burnt or maimed, &c., is felony, and liable to the like punishment.

*Rape.*—Rape is defined by Lord Hale to be the carnal knowledge of any woman, above the age of ten years, against her will; and of a woman child, under the age of ten years, with or against her will; and the punishment is transportation for life (4 & 5 Vic. c. 56, ss. 1, 4.) By the 9 Geo. 4, c. 31, s. 18, carnal knowledge shall be deemed complete, upon proof of penetration, without the necessity of proving emission. An infant, under the age of fourteen years, is presumed by law unable to commit a rape, but he may be a principal in the second degree, as aiding and assisting, if it appear by the circumstances of the case that he had a mischievous intent. Although a husband cannot be guilty of a rape on his own wife, yet he may be guilty, as a principal, in assisting another person to commit a rape upon her.

*Ravishing children.*—The 9 Geo. 4, c. 31, s. 17 enacts, that if any person shall unlawfully and carnally know and abuse any girl under the age of ten years, every such offender shall be guilty of felony, and be punishable with transportation for life.

If the evidence on a trial for rape is defective in not making out the penetration, &c., the defendant may be convicted of the assault, according to 7 Will. 4, and 1 Vic. c. 85, s. 11.

*Abduction.*—Abduction is the unlawful taking away of women and children, which, in certain cases, is made penal by statute. By the 9 Geo. 4, c. 31, s. 19, where any woman shall have any interest of any kind in any real or personal estate, or

shall be an heiress presumptive, or next of kin to any one having such interest, if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and shall be subject to transportation for life, or for seven years, or imprisonment for four years. It is a misdemeanor (s. 28), for any person to unlawfully take, or cause to be taken, any unmarried girl under sixteen years, out of the possession and against the will of her father or mother, or guardian, &c.

*Kidnapping children.*]—By 9 Geo. 4, c. 31, s. 21, enticing away or detaining a child under ten years, with intent to deprive the parent, &c., thereof, or to steal any article on its person, or knowingly receiving or harbouring such stolen child, is punishable as felony, with transportation for seven years, or imprisonment, with whipping, for two years.

*Procuring miscarriage.*]—By the 7 Will. 4, and 1 Vic. c. 85, s. 6, whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and be liable to transportation for life, or for fifteen years, or imprisonment for three years.

*Sodomy.*]—This fearfully unnatural offence is, by 6 Geo. 4, c. 31, s. 15, punishable with death.

*Assaults, batteries, &c.*]—As we have seen (p.275),

for an assault or battery, a civil remedy may be had; but a party may also be indicted, and is then liable to fine and imprisonment. Some assaults are by statute punishable more severely. Instead of proceeding by indictment, a party may, in the cases of ordinary assaults and batteries, proceed summarily before a magistrate. Thus, by 9 Geo. 4, c. 81, s. 27, persons committing any assault and battery, may be compelled by two magistrates to pay a fine and costs, not exceeding £5, or may be committed on non-payment; if the magistrates dismiss the complaint, they are to make out a certificate to that effect, which is to be a bar to any other proceedings (s. 28). These provisions, however, do not apply to aggravated cases of assault, accompanied by any attempt to commit felony; upon which the magistrates are not to adjudicate (s. 29). Assaults with intent to commit felony; assaults on peace officers, or to prevent the arrest of offenders; or in pursuance of a conspiracy to raise wages; are punishable with imprisonment and hard labour.

*Spring guns.*—By 7 & 8 Geo. 4, c. 18, to set or place (except in a dwelling-house, from sunset to sunrise) any spring gun, man trap, &c., is a misdemeanor, punishable with fine and imprisonment (b).

## CHAP. XLVI.

## OFFENCES AGAINST PROPERTY.

[See 4 Black. Com. chaps. 16, 17; 4 Steph. Com. chap. 5.]

*Arson.*] — Arson is the malicious and voluntary burning the house of another by night or by day. By the 7 Will. 4 and 1 Vic. c. 89, s. 2, whosoever shall maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and shall be punished with death. By s. 3, whosoever shall unlawfully and maliciously set fire to any church or chapel, or shall unlawfully or maliciously set fire to any house, stable, outhouse, warehouse, barn, granary, hovel, shed, or fold (7 & 8 Vict. c. 62), whether in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and be transported for life, or fifteen years, or be imprisoned for three years. And the like punishment is provided for maliciously setting fire to any hay, straw, wood, &c., or implements of husbandry being in any farm-house or building, with intent to set fire to such farm-house or building and to injure or defraud any person.

*Burglary.*]—Burglary is the breaking and entering the mansion-house of another, to the intent to commit some felony within the same, whether the felonious intent be executed or not. There must be both a *breaking* and an *entering* to constitute this offence; and it seems they ought to be such as will enable the burglar to commit the intended felony. To enter a house by a door or window which is left open, or through a hole made before by another person, is not a sufficient breaking; but to shove up a window, to lift up the latch of a door, or the like, is such a breaking in the eye of the law as will satisfy the offence; and any the least entry, as by putting a foot over the threshold, or a hook into a window, is also sufficient. And by 7 & 8 Geo. 4, c. 29, s. 11, if the entry be obtained without breaking, and the burglar in the night-time break out of the house, it is such a breaking and entry as will amount to this offence. A house wherein a man dwells but for part of the year, or which one has hired to live in, and brought part of his goods to, but has not yet lodged in it, or a chamber in one of the inns of court, and even a common lodging-room, if the landlord do not sleep under the same roof, are all of them the mansion-houses of those who dwell therein; and even part of a house which is divided, and has an outer door of its own to the street. Formerly, all out-buildings, as barns, stables, dairy-houses, shops, workshops, &c., which either adjoin to the house or are within what is called the *curtilage*, or in which the owner or any part of his family sleep, were considered as part of the house, but by 7 & 8 Geo. 4, c. 29, s. 13, this is not now so, unless there be a *communication* between such building and dwelling-house, either immediately or by means of a covered and inclosed passage leading from the one to the other. The felony intended to be committed may be either



a felony at common law or by statute; but the indictment must state, and the verdict find, an intention to commit some felony; for if it appear that the offender meant only to commit a trespass, he is not guilty of burglary.

*Larceny.*]—Larceny is either *simple* or *mixed*. Simple larceny was also formerly distinguished into grand and petit. Grand larceny was where the goods amounted to more than the value of twelve pence; petit larceny was where the goods so taken were of or under the value of twelve pence. But this distinction is now abolished by 7 & 8 Geo. 4, c. 29, s. 2, by which any larceny, whatever the value of the property stolen, is now subject to the same incidents as grand larceny was before the act. Mixed or compound larceny is a felonious taking of the goods of another, either from his person or his house, and includes the crimes of robbery and house-breaking.

Larceny, or theft, is the unlawful taking and carrying away of the personal goods of another, with intent to deprive the owner of the same, against the will of the owner.

Every larceny must include a trespass; and if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away. Thus if a person find goods, and convert them *animo furandi* to his own use, or obtain the actual delivery of them from the owner for a special purpose, as a carrier to convey them to a certain place, or a tailor to make them into clothes, and afterwards converts them, yet neither the finder, the carrier, nor the tailor can be guilty of larceny: but if the goods were not lost, or the carrier or tailor pretended to convey them, or to make them up, with a dishonest or fraudulent intent to carry them feloniously away,

in such case the law will consider them, notwithstanding the delivery, as constructively remaining in the possession of the owner; and being taken from his possession, the parties carrying them away will be guilty of larceny. To constitute larceny, the property must be taken from the possession of the owner; and, therefore, where a man intending to go a distant journey hires a horse fairly and *bonâ fide* for that purpose, and evidences the truth of such intention by actually proceeding on his way, and afterwards rides off with the horse, it is no theft, because the felonious design was hatched subsequent to the delivery; and the delivery having been obtained without fraud or design, the owner parted with his possession as well as his property, and thereby gave the hirer complete dominion over the horse, upon trust that he would return him when the journey was performed; but where one Peares hired a horse to go a few miles from town, but, instead of going, immediately sold the horse, and the jury found that he had hired it with a fraudulent view and intention to convert it to his own use, the judges held it to be felony; and many cases of a similar nature have received the like determination. A person, also, who has the bare charge or special use of goods, but not the possession, as a shepherd who looks after sheep, a butler who takes care of plate, may be guilty of felony in taking them away. And by 7 & 8 Geo. 4, c. 29, whoever shall steal a chattel or fixture let to be used by him in any house or lodging shall incur the penalties of simple larceny.

The bare removal from the place in which the goods are taken, although the thief do not quite make off with them, is a sufficient asportation or carrying away; as when a guest having taken the sheets from his bed had removed them into the hall, but was detected before he got out of the house.

In larceny at the common law the goods taken must be personal goods, for larceny cannot be committed of things fixed to the freehold, or savouring of the realty, or where their whole value is derived from the relation they bear to some other things, as bonds, deeds, and other securities. So, also, they ought not to be things of a base nature, as dogs, cats, bears, and the like; but of wild animals, as fish in a river, deer, hares, or conies, in a park, field, or warren, if they be restrained or appropriated, or reduced to tameness, larceny may be committed. But things not formerly the subject of larceny at the common law are now made punishable as larceny. Thus, by the 7 & 8 Geo. 4, c. 29, provisions are made against stealing valuable securities, such as bonds, bills, and the like, and various other kinds of property, as records, wills, title deeds, deer, hares, or conies, beasts or birds, pigeons, fish, oysters, ores in mines, trees or shrubs, fences, stiles, or gates, plants, fruits, &c., fixtures in houses, squares or street fences; by 1 Vict. c. 87, s. 8, as to plundering wrecks; 8 & 9 Vict. c. 47, as to stealing dogs.

The general punishment of simple larceny is transportation for seven years, or imprisonment for two years, hard labour, solitary confinement, and whipping. In some cases the punishment is more severe; as, stealing goods or articles of silk, woollen, linen, or cotton in process of manufacture, in any building, field, or other place, to the value of ten shillings, is transportation for fifteen years and not less than ten, or imprisonment for three years (7 & 8 Geo. 4, c. 29, s. 16; 1 Vict. c. 90). So, stealing any horse or cattle, or killing same for its skin, is liable to the same punishment (*a*). On the other hand, in the cases of juvenile offenders of or under the age of fourteen years, committing, or aiding, &c., to commit, any offence declared to be

simple larceny or punishable as such, two justices may, by 10 & 11 Vict. c. 82, order them to be imprisoned for three months or to pay a fine of £3, with whipping and hard labour.

*Larceny from a dwelling-house, &c.*—Having now done with simple larceny, we pass to the more serious subject of mixed larceny. And first, of larceny from a dwelling-house, &c. By the 7 & 8 Geo. 4, c. 29, if any person break and enter any dwelling-house, or building within the curtilage and occupied therewith, or any shop, warehouse, or counting-house, and steal therein any chattel, money, or valuable security, he shall be transported for fifteen years, or imprisoned for three years (1 Vic. c. 90). And any person stealing any property in any dwelling-house, and by any menace or threat putting any one being therein in bodily fear, is, by 7 Will. 4 and 1 Vict. c. 86, s. 5, subject to the same punishment. The punishment for breaking and entering any *church* or *chapel*, or breaking thereout, and stealing any chattel, is transportation for life or imprisonment for three years.

*Larceny from the person.*—This is usually called robbery. By the 7 Will. 4 and 1 Vic. c. 87, whoever shall rob any person, and shall wound him, shall suffer death; whoever being armed shall rob, or assault with intent to rob, or shall do so in company with one or more persons, or shall rob and beat, &c., any person, shall be transported for life, or fifteen years, or imprisoned for three years. Merely robbing or stealing property from the person is transportation for fifteen or ten years, or imprisonment for three years. Assaulting with intent to rob, or with menaces or force demanding any property with intent to steal it, is imprisonment for three years.

And we may here mention that by the 7 Will. 4 and 1 Vic. c. 85, s. 11, it is provided, that on the trial of any person for any felony whatever, where the crime charged shall include an assault against the person, the jury may acquit of the felony, and find a verdict of guilty of assault. The punishment is imprisonment for three years.

*Extorting money or property by threats.*—It will be proper here to notice the subject of threats of accusations of crime for the obtaining of property. The 10 & 11 Vict. c. 66, which is an act to extend the provisions of the law respecting threatening letters and accusing parties with a view to extort money, after reciting the 7 & 8 Geo. 4, c. 29, and so much of the 7 Will. 4 and 1 Vic. c. 87, as relates to accusations of unnatural crimes, enacts: 'That if any person shall knowingly send, or deliver, or utter to any other person, any letter or writing accusing, or threatening to accuse, any person of any crime punishable with death or transportation, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime, with a view or intent thereby to extort or gain any property, money, security, or other valuable thing, from any person whatever, or any letter or writing threatening to kill or murder any other person, or to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay or straw, or other agricultural produce, or shall knowingly procure, counsel, aid, or abet the commission of the said offences or either of them, every such offender shall be guilty of felony, and shall be liable to be transported for life, or for seven years, or to be imprisoned for four years. By sect. 2, if any person shall accuse, or threaten to accuse, any person of any of the crimes before specified, with the view or

intent in any of the cases last aforesaid to extort or gain from any person whatever any property, money, security, or other valuable thing, every such offender shall be guilty of felony, and shall be liable to be transported for life, or for seven years, or to be imprisoned for four years. This act extends the scope of these offences. Money need not now have been extorted; the threat suffices; and there were some qualifying words as to "reasonable and probable cause" in the 7 Will. 4 and 1 Vict. c. 87, which have been properly omitted in this act.

*Larceny by clerks, &c.*] — By the 7 & 8 Geo. 4, c. 29, s. 46, any clerk or servant stealing any chattel, money, or valuable security, belonging to or in the possession or power of his master, is subject to transportation for fourteen and not less than seven years, or imprisonment for three years, with hard labour and solitary confinement, and whipping. By s. 47, if any clerk or servant shall, by virtue of such employment, receive, or take into his possession, any chattel, money, or valuable security, for his master, and shall fraudulently embezzle the same, or any part thereof, he shall be deemed to have feloniously stolen the same from his master, although such money, chattel, or security was not otherwise received into the possession of such master. The punishment is the same as just stated.

*Embezzlement by bankers or other agents.*] — By the 7 & 8 Geo. 4, c. 29, s. 49, if any money, or security for the payment of money, shall be entrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money or any part thereof, or the proceeds, or any part of the proceeds, of such security, for any purpose specified in such direction, and he shall, in vio-

lation of good faith, and contrary to the purpose so specified, in any wise convert to his own use or benefit such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and be liable to transportation for fourteen and not less than seven years, or fine, or imprisonment, or both. There are other provisions as to unlawful conversion of chattels, valuable securities, or powers of attorney (ss 49, 50).

*Embezzlement by factors.*—By the 7 & 8 Geo. 4, c. 29, s. 51, if any factor or agent entrusted, for the purpose of sale, with any goods or merchandise, or with any bill of lading, warehousekeeper's or wharfinger's certificate, or warrant, or order for delivery of goods or merchandise, shall, for his own benefit, and in violation of good faith, deposit or pledge any such goods or merchandise, or any of the said documents as a security (to a greater amount than the debt due to him) for any money or negotiable instrument borrowed or received by such factor or agent at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, every such offender shall be guilty of a misdemeanor. The punishment is transportation for fourteen, and not less than seven, years, or imprisonment for three years.

*Post-office, larceny by servant in the.*—By the 1 Vict. c. 36, s. 26, any person employed under the Post-office, stealing, or for any purpose whatever embezzling, secreting, or destroying a post letter, if the letter contain any chattel, money, or valuable security, is subject to transportation for life, or for seven years, or imprisonment for four years; if the letter do not contain any chattel, money, or valuable security, then to transportation for seven years,

or imprisonment for three years. By sect. 27, any person stealing from or out of a post letter, any chattel, money, or valuable security, is liable to transportation for life, or for seven years, or imprisonment for four years. There is the same punishment (s. 28) for stealing a post letter-bag, or a post letter from a post letter bag, or stealing a post letter from a post-office, or from a mail, or stopping a mail with intent to rob or search the same.

*Stealing from vessels.*—Any person stealing any goods or merchandise in any vessel, barge, or boat, in any port or entry of discharge, or upon any navigable river or canal, or in any creek, or stealing any goods or merchandise from any dock, wharf, or quay, adjacent to any such port, river, canal, or creek, is by 7 & 8 Geo. 4, c. 29, s. 17, as amended by 1 Vict. c. 90, liable to be transported for not more than fifteen years and not less than ten, or to be imprisoned for three years.

*Malicious injuries.*—By the common law a malicious injury to property amounted in general to a mere trespass; but it is now made penal. The principal statute is the 7 & 8 Geo. 4, c. 30. Under it express malice against the owner of the property injured is not requisite. The act provides against malicious injuries to silk, woollen and other articles in the loom or frame, or in any stage of manufacture, to threshing machines or other machines employed in manufacture, to mines, to ships, otherwise than by fire; to sea-banks, sea-walls, navigable rivers, and bridges; to turnpike gates and toll houses; to fish ponds and mill ponds; to cattle; to hop binds; to trees, saplings, shrubs, and underwood; to plants, fruits, and vegetable productions in gardens,



orchards, nursery-grounds, bothouses, greenhouses, or conservatories; to cultivated roots or plants used for certain purposes, and not growing in a garden, orchard, or nursery-ground; and to fences, walls, stiles, or gates. All which are made, according to their several degrees of mischief or malignity, felonies, misdemeanors, or offences merely punishable with pecuniary penalties on summary conviction before a justice of the peace. By sect. 24, it is provided that if any person shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatever, either of a public or private nature, for which no remedy or punishment is therein before provided, such offender, being convicted thereof before a justice of the peace, shall forfeit such sum of money as shall appear to the said justice a reasonable compensation for the damage committed, not exceeding five pounds; which sum shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence; and in such case, or when property of a public nature or a public right is concerned, the money shall be applied to the benefit of the poor of the place where the offence was committed, subject, however, to a proviso that nothing therein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of; nor to any trespass, not being wilful or malicious, committed in hunting, fishing, or the pursuit of game.

There are several provisions in the 7 Will. 4 and 1 Vict. c. 89, for the punishment of persons destroying ships and vessels.

As to malicious injuries to persons and property by *fire* or by *explosive* or *destructive substances*, the 9 & 10 Vict. c. 25, enacts, that whoever shall un-

lawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling-house, any person being therein, shall be guilty of felony. So (sect. 2) persons blowing up buildings with intent to murder, or whereby the life of any person shall be endangered; or (sect. 3) injuring other persons by explosive substances; or (sect. 4) attempting to do bodily injury by sending, &c., explosive or dangerous substances, although, in fact, no bodily injury be effected: the penalty for any of the previous offences is (sect. 5) transportation for life, or for any term not less than fifteen years, or imprisonment not exceeding three years. Persons convicted of attempting to blow up buildings or vessels, although no damage shall have been actually done, may be (sect. 6) transported for not more than fifteen years, or be imprisoned for not more than two years. Persons convicted of attempting to set fire to buildings, vessels, mines, stacks, or steers, or to any vegetable produce, may be (sect. 7) transported for not more than fifteen years. By sect. 8, persons convicted of having in their possession, or of having manufactured, &c., explosive substances or machines, &c., with intent thereby to commit, or to enable others to commit, any of preceding offences, are guilty of a misdemeanor, and may be imprisoned for not more than two years. By sect. 10, every principal in the second degree, and every accessory before the fact, to any of the above felonies, shall be punishable in the same manner as the principal in the first degree; whilst every accessory after the fact to any such felonies is to be imprisoned for not more than two years. By sect. 12, justices may issue warrants for searching any house, &c., in which any explosive substance is suspected to be made or kept. By sects. 13 and

14, persons loitering at night, suspected of felony under the act, may be apprehended without warrant. The offences under the act are not (sect. 15) to be tried by justices at sessions.

*Injuries to pictures, &c.*]—By the 8 & 9 Vic. c. 44, unlawfully and maliciously to destroy or damage anything kept for the purposes of art, science, or literature, or as an object of curiosity, in any public repository, or any public statue or monument, or any picture or the like, in a place of worship, is made a misdemeanor punishable with imprisonment for six months, and hard labour or whipping.

*Forgery.*]—Forgery, or the *crimen falsi*, is “the fraudulent making or altering of a writing purporting to be valid, to the prejudice of another man’s right;” for which, by the common law, the offender may suffer fine, imprisonment, and pillory; but now by statute much more severe punishment is inflicted. The principal act relating to forgery is the 11 Geo. 4 and 1 Will. 4, c. 66, which (as we have before seen) makes the offence of forging the great seal, the privy seal, or any privy signet, the sign manual, the seals of Scotland, or the great seal and privy seal of Ireland, treason; and, as regards all exchequer bills, Bank of England notes, bills of exchange, promissory notes, deeds, receipts, orders for the payment of money, transfers of stock, and a variety of other documents (comprising all that are in the most ordinary use in the transactions of mankind), enacts that the forging or uttering them, knowing them to be forged, and with intent to defraud, shall be felony. It attaches also the same penalty to the offence even of having in possession without lawful excuse (such excuse to be proved by the party ac-

cused) any forged bank note, or the like, knowing it to be forged, or of having in possession (without such excuse) any frames, moulds, &c., for paper, with the names of any banker visible in the substance of the paper.

As to the punishment of forgery, by several statutes, the last of which was the 1 Vic. c. 84, the punishment of death was taken away, and now the offender is liable to transportation for life, or for not less than seven years, or to imprisonment for not more than four and not less than two years, with hard labour and solitary confinement.

*False personation.*]—False personation is the assuming the name or character of, or passing for, another, for the purpose of fraud.

*Personating soldiers and seamen.*]—The false personation of soldiers, or their representatives, when entitled to prize money, is made felony by the 2 Will. 4, c. 53, s. 49, and punishable by transportation for life, or for seven years. When entitled to pension, wages, pay, grant, or other allowance, it is felony pursuant to the 7 Geo. 4, c. 16, s. 38, and punishable by transportation for life, or for such term of years as the court shall adjudge. The same offence, as regards seamen or their representatives, is felony by 1 Will. 4, c. 20, s. 84, and is punishable by transportation for life, or seven years, or imprisonment for between two and four years. By 1 Will. 4, c. 66, s. 7, the false personation of an owner of stock or of the stock of any public company, or an owner of dividend, and thereby endeavouring to transfer his share or receive his dividend, is subject to the same punishment.

*False pretences.*]—By the 7 & 8 Geo. 4, c. 29,

s. 53, if any person shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, he shall be guilty of a misdemeanor, and shall not be acquitted because the offence amounts to a larceny. The punishment is transportation for seven years, or fine, or imprisonment, or both.

## CHAP. XLVII.

## PREVENTING OFFENCES.

[See 4 Black. Com. chap. 18; 4 Steph. Com. chap. 18.]

The means of preventing offences are by ordering a party suspected of an intention to misbehave himself to give pledges or securities for keeping the peace, or for his good behaviour.

The security, either for keeping the peace or for good behaviour, consists in being bound with one or more securities in a recognisance or obligation to the crown, and taken in some court, or by some judicial officer, whereby the parties acknowledge themselves to be indebted to the crown in the sum required (for instance, £100), with condition to be void and of none effect if the party shall appear in court on such a day, and in the mean time shall keep the peace, either generally towards the sovereign and all her liege people; or particularly also, with regard to the person who craves the security; or on condition so to keep the peace for a certain period not dependent on any appearance in court. Or if it be for the good behaviour, then on condition that he shall demean and behave himself well, or be of good behaviour, either generally or specially, for the

time therein limited, as for one or more years, or for life. If the condition of such recognisance be broken by any breach of the peace in the one case, or any misbehaviour in the other, the recognizance becomes forfeited or absolute, and the party and his sureties become the crown's absolute debtors for the several sums in which they are respectively bound.

Any justice of the peace may grant such security, or application may be made to the Queen's Bench or Chancery, or the Quarter Sessions, upon articles exhibited in court, and supported by the oath of the exhibitant, the truth whereof cannot be controverted.

## CHAP. XLVIII.

## SUMMARY CONVICTIONS.

[See 4 Black. Com. chap. 20 ; 4 Steph. Com. chap. 15.]

The proceedings in courts of criminal jurisdiction are of two kinds, *summary and regular*. Summary proceedings are the creatures of statutes, and are usually had before one or two justices of the peace, without the intervention of a jury. There are, indeed, summary proceedings before the commissioners of the excise, for frauds on the excise ; but of these we shall not here speak. Another kind of summary proceeding is by attachment for contempt of court.

The instances of summary proceedings before justices are very numerous, and are such where the punishment is a fine or imprisonment. There are also instances in which the summary jurisdiction is exercised in matters not properly criminal, and which merely require orders for payment of money. The proceedings on summary convictions are now regulated by the 11 & 12 Vic. c. 43, which takes effect from the 2d of October, 1848. The act extends to England and Wales, and Berwick-on-Tweed, but not to Scotland, Ireland, or the Channel Islands, except as to backing warrants. It does not apply to any order for the removal of a pauper (p. 108) ;



nor to orders respecting lunatics (p. 43); nor to informations relating to the excise or customs, stamps, taxes, or post office; nor to bastardy orders (p. 127), except as to backing warrants, &c.; nor to young children in factories.

*Information and summons, &c.*—The first proceeding is an information or complaint. The information must be in writing, but the complaint whereon the order is sought need not be so, unless the particular act of parliament requires it. No oath is required in making a complaint or laying an information, except where expressly so required, and except where a warrant is to issue in the first instance. The complaint or information must be laid within six calendar months, unless otherwise expressly provided. Provisions are made (s. 4) for the description of the ownership of property, in cases of particular owners. No variance between the information and the evidence is material; but if the defendant be deceived thereby, the hearing may be adjourned, defendant being committed, or giving recognisance to appear again. After the information is laid, or complaint made, a summons issues, which must be served on the accused. If the defendant do not appear thereto, a warrant for his arrest may issue; and, indeed, where the information is laid, and the same is substantiated by oath, the justice may issue a warrant in the first instance. The warrant may be backed as provided by 11 & 12 Vic. c. 42, stated in the next chapter.

*The justices and court.*—The hearing takes place before one or two justices, according as the particular statute requires; but if there be no regulation as to this, then the complaint or information “may be heard, tried, determined, and adjudged by any one

justice of the peace for the county, riding, division, liberty, city, borough, or place where the matter of such information shall have arisen." The place where the justice sits is to be deemed an open court. There are provisions (ss. 33, 34) as to one London, metropolitan, or stipendiary magistrate acting alone. One justice alone (s. 29) may issue the summons or warrant, even where there must be two justices present at the hearing; and so, one justice may, in such case, issue warrants of distress or commitment, and though he did not hear the case.

*Witnesses.*.]—The prosecutor of the information, not having any pecuniary interest in the result, and every complainant, though interested, may be witnesses. The witnesses must be sworn. By s. 6, if it be shown, on oath, that a witness will not voluntarily attend, the justice may issue a summons requiring his appearance, and if he still neglect, a warrant may issue. Indeed, if it be sworn that it is probable a witness will not attend, the justice may, in the first instance, issue a warrant for his apprehension.

*Non-appearance.*.]—If the defendant does not appear, the justice may proceed to hear and determine the case in his absence, or may issue warrant, and adjourn the hearing till defendant is apprehended. If the defendant appear, and complainant, &c., does not, the justice may dismiss the complaint, &c., or, at his discretion, adjourn the hearing, and commit the defendant, or discharge upon recognizances.

*Hearing on appearance.*.]—Where the defendant is present at the hearing, the substance of the information or complaint must be stated to him, and he must be asked if he have any cause to show why

he should not be convicted, or why an order should not be made against him; and if he admit the truth of the charge, and show no sufficient cause, then the justice may convict him or make an order against him accordingly; but if he do not admit the truth of the charge, then the justice proceeds to hear the complainant and his witnesses, and also to hear the defendant and his witnesses, and also to hear such witnesses as the complainant may examine in reply, if such defendant shall have examined any witnesses or given any evidence other than as to his (the defendant's) general character; but the complainant is not entitled to make any observations in reply upon the evidence given by the defendant, nor is the defendant entitled to make any observations in reply upon the evidence given by the complainant in reply. The justice having heard each party and the witnesses and evidence, convicts or makes an order upon the defendant, or dismisses the information or complaint, as the case may be.

*Adjournment.*.]—The justice may adjourn the hearing of cases, and commit the defendant, or suffer him to go at large, or discharge him upon a recognizance, with or without sureties, which recognizance, in case of non-appearance, is forfeited.

*Convictions.*.]—The form of a conviction or order is to be as given in the statute, except where a *future* statute shall give a different form. It is to be lodged with the clerk of the peace, and to be filed among the records of the general quarter sessions of the peace.

*Dismissal certificate.*.]—If the justice dismiss such information or complaint, he must make an order

of dismissal of the same, and give the defendant a certificate thereof, which certificate, without further proof, shall be a bar to any subsequent information or complaint for the same matters respectively against the same party.

*Costs.*—By s. 18, power is given to the justice to award costs, which shall be specified in conviction or order of dismissal, and may be recovered by distress; if nothing be obtained, the party may be committed to gaol for one month, to be reckoned distinctly from any other commitment (ss. 24, 26).

*Distress warrant—Backing.*—By s. 19, where a conviction adjudges a pecuniary penalty or compensation to be paid, or where an order requires the payment of a sum of money, and by the statute authorising such conviction or order such penalty, &c., is to be levied upon the goods and chattels of the defendant by distress and sale thereof, and also in cases where by the statute in that behalf no mode of raising or levying such penalty, &c., or of enforcing the payment of the same, is provided, the justice making such conviction or order, or any justice of the peace for the same county, &c., may issue his warrant of distress for the purpose of levying the same, which warrant of distress shall be in writing under the hand and seal of the justice making the same. If a sufficient distress shall not be found within the limits of the jurisdiction of the justice granting such warrant, then, upon proof alone being made on oath of the handwriting of the justice granting such warrant before any justice of any other county or place, such justice of such other county or place shall thereupon make an indorsement on such warrant, signed with his hand, authorising the execution of such warrant within

the limits of his jurisdiction, by virtue of which said warrant and indorsement the penalty or sum aforesaid, and costs, or so much thereof as may not have been before levied or paid, shall and may be levied by the person bringing such warrant, or by the person or persons to whom such warrant was originally directed, or by any constable or other peace officer of such last-mentioned county or place, by distress and sale of the goods and chattels of the defendant in such other county or place.

*Commitment to prison.*—By s. 19, where the issuing a warrant would be ruinous to defendant, or where there are no goods, the justice may commit him to prison; and this may be done (s. 21) where the distress is not sufficient. So, by s. 22, in all cases of penalties, convictions, or orders, where the statute provides no remedy in default of distress, the justice may commit a defendant to prison; and by s. 23, power is given to the justice to order commitment in the first instance for nonpayment of a penalty or of a sum ordered to be paid, where the statute directs imprisonment in default of payment. And by s. 24, the justice may order commitment where the conviction is not for a penalty, nor the order for payment of money, and the punishment is by imprisonment.

*Juvenile offenders.*—It is proper to here mention the 10 & 11 Vic. c. 82, for the summary conviction of juvenile offenders. The act provides that every person who shall be charged with having committed or having attempted to commit, or with having been an aider, abettor, counsellor, or procurer in the commission of any offence which is simple larceny, or punishable as simple larceny, and whose age at the period of the commission or attempted commis-

sion of such offence, shall not, in the opinion of the justices, exceed the age of fourteen years, shall, upon conviction thereof, upon his own confession or upon proof, before two or more justices of the peace of any county, &c., in petty session assembled, at the usual place and in open court, be committed to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding three calendar months, or shall forfeit and pay a sum not exceeding three pounds, or, if a male, shall be once privately whipped, either instead of or in addition to such imprisonment or imprisonment with hard labour; and the said justices shall from time to time appoint some fit and proper person, being a constable, to inflict the said punishment of whipping, when so ordered to be inflicted out of prison. One metropolitan police magistrate and any stipendiary magistrate, sitting in open court, may act alone. The justices, if they think the offence is not proved, or that it is not expedient to punish (awarding or not surety for good behaviour) may grant a certificate, which is a full release from all other proceedings, as is also a conviction. The conviction is not to be removed by *certiorari*; and no forfeiture ensues, but restitution may be ordered.

*Contempt of court.*—The superior courts punish all contempts against them by attachment. Most of these contempts are merely so constructively; and where the contempt consists in the disobeying an order for payment of money, an execution may issue under the 1 & 2 Vic. c. 110 (a). If the offence be committed in the face of the court, the offender may be instantly apprehended and imprisoned at the discretion of the judges, without any further proof or examination. If the contempt be at a dis-

tance, the party is first called on to show cause why an attachment should not issue, except in flagrant instances. The attachment is merely to bring the party into court, and he either stands committed, or puts in bail, in order to answer on oath such interrogatories as may be put to him. He may clear himself of the contempt; or, if guilty, may be punished by fine or imprisonment, or both (*b*).

## CHAP. XLIX.

## CRIMINAL PROCEEDINGS.

[See 4 Black. Com. chaps. 21—32; 4 Steph. Com. chaps. 16—26.]

Having described, in as ample a manner as the limits of our volume would admit, the several crimes and misdemeanors of which offenders may be guilty, with the means of preventing offences, and the proceedings on summary convictions, we now purpose to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction, which may be distributed under eleven general heads, following each other in a progressive order, viz.,—3, Information and arrest; 2, Commitment and bail; 1, Prosecution; 4, Process; 5, Arraignment and its incidents; 6, Plea and issue; 7, Trial and conviction; 8, Judgment and its consequences; 9, Reversal of judgment; 10, Reprieve or pardon; 11, Execution.

## SECT. I.—INFORMATION AND ARREST.

[See 4 Black. Com. chap. 21; 4 Steph. Com. chap. 16.]

Arrest is the apprehending or restraining one's person, in order to be forthcoming to answer an alleged or supposed crime. Arrests may be made,



1, By warrant; 2, By an officer without a warrant; 3, By a private person without a warrant; and, 4, By hue and cry.—First, A warrant is a precept, under the hand and seal of some magistrate, issued on some charge (called an information or complaint) made upon oath, setting forth the time and place of making it, and the cause for which it is made, to bring an offender before a magistrate, for the purpose of examining into the truth of the charge. A justice of the peace may, by 11 & 12 Vic. c. 42, s. 1, issue a warrant to apprehend a person accused of treason, felony, of offences on the high seas or abroad, or any other indictable offence; and, if properly penned, it will indemnify the officer who executes it. Where the offence was not of a serious nature, it was even formerly usual to issue a summons merely in the first instance; and now, by 11 & 12 Vic. c. 42, the magistrate may, if he please, issue a summons in all cases in the first instance. If the summons be not obeyed, a warrant may issue. In the case of a summons issuing, the information or complaint may be by word of mouth merely, without any oath to substantiate it. The summons must be served by a constable on the defendant personally, or by leaving the same for him with some one at his last or most usual place of abode.

*Backing warrants.*—Formerly there ought to have been a fresh warrant for every county; but the practice of backing warrants had long prevailed without law, and was at last authorised by the 23 Geo. 2, c. 26, and 24 Geo. 2, c. 55. By the 13 Geo. 3, c. 31, and 54 Geo. 3, c. 186 (now repealed by 11 & 12 Vic. c. 42), and other acts, provisions were made as to the apprehension of offenders who have gone from one part of the United Kingdom to another; and by 6 & 7 Vic. c. 34, as

to the apprehension in the United Kingdom of persons committing treason or felony out of the United Kingdom, and *vice versâ*. But now, by 11 & 12 Vic. c. 42, complete regulations are made for the backing of warrants. By s. 11, where the defendant is not within the jurisdiction of the justice issuing the warrant (in England or Wales), a justice for the county or place where he shall be, or be supposed or suspected to be, shall, on oath of signature to the original warrant, sign an indorsement thereon, authorising the execution of the warrant within his jurisdiction. By s. 12, English warrants may be backed in Ireland, and *vice versâ*. By s. 13, English warrants may be backed in the Isles of Man, Guernsey, Jersey, Alderney, and Sark, and *vice versâ*. By s. 14, English warrants may be backed in Scotland. By s. 15, Scotch warrants may be backed in England or Ireland.

*Warrant by privy council.*]—In cases of treason, or offences affecting the Government, the privy council, or one of the secretaries of state, may grant a warrant. So, in case of felony, may a judge of the the Court of Queen's Bench.

*Arrest without warrant.*]—Secondly, a justice of peace, or a constable, may apprehend a person for felony or breach of the peace in his own view, without warrant. The sheriff and coroner may apprehend any felon within the county without a warrant. A constable may apprehend all offenders, particularly night-walkers, and commit them to custody till morning. A number of statutes give a constable, and in many cases a party injured, this power of arresting without warrant.—Thirdly, any private person that is present when a felony is committed is bound, on pain of fine and imprisonment,

to arrest the offender. By the 7 Geo. 4, c. 64, s. 28, a person actively aiding in the apprehension of a person guilty of murder, or other heinous crime, may be compensated.—Fourthly, the constable, on information given him of a felony is bound to make hue and cry.

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## SECT. II.—COMMITMENT AND BAIL.

[See 4 Black. Com. chap. 22; 4 Steph. Com. chap. 17.]

When a delinquent is arrested, he must be carried without delay before a magistrate (even in offences committed within the jurisdiction of the Admiralty), where he must be either bailed or committed, unless it manifestly appear that he is not guilty of the crime laid to his charge, in which case only is it lawful to discharge him without bail. The proceedings on the hearing, commitment, and bailing are regulated by the 11 & 12 Vic. c. 42, and are as follows:—

*Court, &c.*—The place where the examinations are taken is not to be deemed an open court, and no person is to remain without the consent of the justice. One London, metropolitan, or stipendiary magistrate may act alone.

*Remanding.*—If a person be apprehended in one county on a charge of an offence committed in another, he may be examined in the former, and if the evidence be deemed sufficient, he may be committed to prison; but if insufficient, he is to be brought before some justice of the latter county. As to remanding a prisoner, the justice may, if it be necessary or advisable, by warrant, remand the accused from time to time, for any reasonable period not

exceeding eight clear days. If the remand be for not more than three clear days, no warrant is requisite. On the remand, the accused may be admitted to bail.

*Witnesses.*]—If a witness will not voluntarily attend, and it be so sworn, the justice may issue a summons to compel his appearance, and if not obeyed, a warrant to apprehend him may issue. Indeed, a warrant may issue in the first instance, where the justice is satisfied by oath that it is probable the witness will not voluntarily attend. If a witness refuse to be sworn or examined, he may be committed for seven days. The statements of a witness are to be reduced into writing, read over, and signed by him, and also signed by the justice. It is provided (s. 17), that the depositions of persons who have died, or who are so ill as not to be able to travel, may be read as evidence, if shown to have been duly taken.

*Prisoner's defence.*]—After the examinations of all the witnesses on the part of the prosecution have been completed, the justice must, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" and whatever the prisoner then says in answer thereto must be taken down in writing, and read over to him, and be signed by the said justice, and kept and transmitted with the depositions of the witnesses;

and upon the trial the same may, if necessary, be given in evidence against him, without further proof thereof, unless it be proved that the justice purporting to sign the same did not in fact sign the same. However, in such cases, the justice must inform the prisoner that he has nothing to hope or fear from either promise or threat.

*Discharge—Commitment.*—If, after hearing the evidence against the accused, it is not thought sufficient to warrant his commitment, he shall be discharged; but if the evidence is considered sufficient, the justice shall, by warrant, commit the accused for trial.

*Binding over to prosecute.*—The prosecutor and witnesses are bound by recognisance to appear at the next court of oyer and terminer, or gaol delivery, or court of general or quarter sessions. A notice of such recognisance is forthwith delivered to such party. Witnesses who refuse to enter into recognisances may be committed.

*Bail.*—Where the accused is charged with a felony, or with an assault with intent to commit a felony, or with an attempt to commit a felony, or with obtaining or attempting to obtain property by false pretences, or with a misdemeanor in receiving property stolen or obtained by false pretences, or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent exposure of the person, or with riot, or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace officer in the execution of his duty, or upon any person acting in his aid, or with neglect or breach of duty as a peace officer, or with

any misdemeanor for the prosecution of which the costs may be allowed out of the county rate, the justice may, in his discretion, admit such person to bail, upon his procuring and producing such surety or sureties as in the opinion of such justice will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence; and thereupon the justice shall take the recognisance of the said accused person and his surety or sureties, conditioned for the appearance of such accused person at the time and place of trial, and that he will then surrender and take his trial, and not depart the court without leave. And the justice may admit to bail in the like cases after commitment for trial. In the cases of other indictable misdemeanors, the justice has no discretion, but must admit the accused to bail. But no justice is to admit any person to bail who is charged with treason, which can only be done by order of one of the Secretaries of State, or by the Court of Queen's Bench, or a judge thereof in vacation. It is clearly settled that the court of Queen's Bench (or any judge thereof in the time of the vacation), may bail for any crime whatsoever, be it treason, murder, or any other offence, according to the circumstance of the case.

Upon bail being accepted, the magistrate must certify the bailment in writing, and with all examinations and informations, and deliver the same to the proper officer of the court in which the trial is to be had. By 11 & 12 Vic. c. 42, s. 27, a prisoner may, after his final examination, and before the first day of the assizes or sessions, &c., at which he is to be tried, have, on paying at the rate of three-halfpence for same, for each folio of ninety words, a copy of the examination before the magistrate.

## SECT. III.—MODES OF PROSECUTION.

[See 4 Black. Com. chap. 28; 4 Steph. Com. chap. 18.]

The next step towards the punishment of offenders is their prosecution; and this is either upon a previous finding of the fact, by an inquest or grand jury, or without such previous finding: the former way is either by presentment or indictment.

*Presentment.*—This, properly speaking, is the notice taken by the grand jury of any offence from their own knowledge or observation without any indictment; as the presentment of a nuisance, upon which an indictment is afterwards framed. Inquisitions of office found by a jury, including a coroner's inquest, are also called presentments.

*Indictments.*—An indictment is a written accusation of one or more persons of a crime or misdemeanor preferred to a grand jury of twelve men or more, upon their oaths, and found by them to be true. But when such accusation is found by a grand jury without any bill brought before them, it is called (as we have seen) a presentment; and where it is found by jurors returned to inquire of that particular offence only, it is called an inquisition. Indictments must have precise and sufficient certainty. By 1 Hen. 5, c. 5, they must set forth (if known) the Christian name, surname, and addition of the state and degree, mystery, town or place, and the county of the offender. The day and place also, in which the fact was committed, must be named. The offence itself, also, must be set forth with clearness and certainty; and formerly the value of the thing which is the subject or instrument of the offence, must sometimes have been

expressed. But by 9 & 10 Vict. c. 62, it is not now necessary in any indictment for homicide to allege the value of the instrument which caused the death of the deceased, or to allege that the same was of no value.

As to indictments for stealing or receiving stolen goods, the 11 & 12 Vic. c. 46, provides, that in an indictment for feloniously stealing property, a count may be added for feloniously receiving the same property, knowing it to have been stolen; and in any indictment for feloniously receiving property knowing it to be stolen, a count may be added for feloniously stealing the same property; and the prosecutor is not to be put to his election, but the jury may find a verdict of guilty, either of stealing the property or of receiving it knowing it to have been stolen; and where two or more persons are indicted, the jury may find all or any of them guilty either of stealing the property or of receiving it knowing it to have been stolen, or may find one or more of them guilty of stealing the property, and the other or others of them guilty of receiving it knowing it to have been stolen.

*Informations.*]—Besides the mode of proceeding by indictment, there are, according to the nature of the subject, modes of proceeding by information. Informations are of three sorts, viz., *qui tam*, or *ex officio*, or by the Master of the Crown Office; the first is grounded on penal statutes, where the party demands something, as well for the King as himself; the second are those which are filed by the Attorney General; and the third, such as, under the statutes of the 4 & 5 Will. and Mary, c. 18, and 9 Anne, c. 20, may, by leave of the court, be filed in particular cases of misdemeanors, by the master.



*Appeals.*]—There were also proceedings in nature of appeals, but they have been abolished by the 59 Geo. 3, c. 46, by which it is not lawful for any person to sue an appeal for treason, murder, felony, or other offence.

*Defects in indictments.*]—The 7 Geo. 4, c. 46, s. 20, cures certain defects after the proceedings have arrived at a certain stage, and provides that no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words “as appears by the record,” or “with force and arms,” or against the peace,” nor for the insertion of the words “against the form of the statute,” instead of “against the form of the statutes,” or *vice versa*, nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office, or other descriptive appellation, instead of his, her, or their proper name or names; nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence; nor for stating the offence to have been committed on a day subsequent to the finding the indictment or exhibiting the information, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, where the court shall appear by the indictment to have had jurisdiction over the offence.

*Amending indictment.*]—By the 11 & 12 Vic. c. 46 (and see 9 Geo. 4, c. 15), it shall be lawful for any court of oyer and terminer, and general gaol

delivery, to cause the indictment or information for *any offence whatever*, when any variance shall appear between any matter in writing or print produced in evidence, and the recital or setting forth thereof upon the record, to be forthwith amended in such particular, and thereupon the trial shall proceed as if no such variance had appeared.

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#### SECT. IV.—OF PROCESS AND CERTIORARI.

[See 4 Black. Com. chap. 24; 4 Steph. Com. chap. 19.]

When the indictment is found against an offender, the prosecutor is entitled to process.

*Process.*—The proper process on an indictment is a justice's or bench warrant. By 11 & 12 Vict. c. 42, s. 3, where the defendant has not appeared and pleaded, the clerk of indictments or of the peace is, after the end of the sessions at which the indictment was found, to grant a certificate of the indictment having been found. Upon this certificate being produced to any justice for the county, &c., in which the offence was committed, or in which the defendant "shall reside or be, or be supposed or suspected to reside or be," he must issue his warrant for the defendant's apprehension. When apprehended, the prisoner is taken before a justice, and upon proof of his identity is, without further inquiry or examination, committed for trial or admitted to bail, as before stated with respect to arrests on informations before justices. If it happen that the person indicted be already in prison for some other offence, a justice may order him to be detained until removed by writ of habeas.

*Certiorari.*.]—It will be convenient to here notice the subject of *certiorari*, for though it may be had at any time before, and in some cases after trial, it is usually had at this stage of the proceedings. The writ of *certiorari facias* issues to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the Court of Queen's Bench, which, it may be remarked, is the sovereign ordinary court of justice in criminal cases. It is usually either, 1, to consider and determine the validity of indictments and the proceedings thereon, and to quash or confirm them; or, 2, where it is surmised that a partial or insufficient trial will probably be had in the court below, and it is desired to have the trial at the bar of the Queen's Bench, or before the justices of *nisi prius*. The *certiorari*, when delivered to the inferior court, supersedes its jurisdiction. A *certiorari* is obtained on application to the court or a judge at chambers (except in the case of the Attorney-General); a defendant must enter into a recognisance for payment of costs, &c. The writ of *certiorari* is, however, in several cases expressly taken away by statutes. The 9 & 10 Vict. c. 24, s. 3, has made some provisions as to the form of the writ of *certiorari* from the Central Criminal Court.

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#### SECT V.—ARRAIGNMENT AND ITS INCIDENTS.

[See 4 Black. Com. ch. 25; 4 Steph. Com. ch. 20.]

*Arraignment.*.]—To arraign is nothing more than to call the prisoner to the bar of the court, to answer the matter charged upon him by the indictment. Every arraignment must be in English, and the prisoner ought to be used with all the humanity and gentleness which is consistent with his situation.

The prisoner, upon his arraignment, may either confess, stand mute, or plead to issue.

*Confession.*—A confession is either express or implied. An express confession is where a person directly confesses the crime with which he is charged, which is the highest conviction that can be, and may be received, notwithstanding its repugnancy, after the plea of not guilty recorded. An implied confession is where a defendant, in a case not capital, does not directly own himself guilty, but in a manner admits it, by yielding to the King's mercy, and desiring to submit to a small fine.

*Standing mute.*—A prisoner is said to stand mute when, being arraigned for treason or felony, he either makes no answer at all, or answers foreign to the purpose, or formerly having pleaded not guilty, refused to put himself upon the country. But by 7 & 8 Geo. 4, c. 28, s. 1, by a mere plea of not guilty, the prisoner is to be deemed to have put himself upon the country. And by sect. 2 of the same statute, if any person, being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, the court may order the proper officer to enter a plea of not guilty on behalf of such person, and the plea so entered shall have the same force and effect as if such person had actually pleaded the same. When there is reason to doubt, however, whether the prisoner is sane, a jury should be charged to inquire whether he is sane or not, which jury may consist of any twelve persons who may happen to be present; and upon this issue the question will be whether he has intellect enough to plead, and to comprehend the course

of the proceeding. If they find the affirmative, the plea of not guilty may be entered, and the trial will proceed; but if the negative, the provision of 39 & 40 Geo. 3, c. 94, s. 2, is then applicable, by which insane persons indicted for any offence, and on the arraignment found to be insane by a jury empanelled for that purpose, so that they cannot be tried upon the indictment, shall be ordered by the court to be kept in strict custody till the royal pleasure be known.

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#### SECT. VI.—OF PLEA AND ISSUE.

[See 4 Black. Com. chap. 26; 4 Steph. Com. chap. 21.]

A plea is the defensive matter alleged by a prisoner on his arraignment; and it may be either,—1. To the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar; or, 5, The general issue.

A plea to the jurisdiction is when an indictment is taken before a court that has no cognisance of the offence; as, if a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions.

A demurrer is when the fact, as alleged, is allowed to be true, but it is insisted that it is no crime; but as the same advantage may be taken on the plea of not guilty, or in arrest of judgment, demurrers are seldom taken (*a*)

A plea in abatement was principally for a misnomer, or wrong name, or a false addition of the prisoner; but by 7 Geo. 4, c. 64, s. 19, no plea is allowed for such defects, but they are to be set right on affidavit.

A special plea in bar gives a reason why the prisoner should not answer at all, and is of four

kinds:—1. *Autrefois acquit*; 2. *Autrefois convict*; 3. *Autrefois attain*; 4. A pardon.

*Autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, That *no man is to be brought into jeopardy more than once for the same offence*: and therefore, when a man is once found not guilty on an indictment, free from error, and well commenced before any court which hath jurisdiction of the cause, he may, by the common law, in all cases whatsoever, plead such acquittal in bar of any subsequent indictment for the same crime.

*Autrefois convict* is a plea depending on the same principle as the former.

*Autrefois attain*, or a former attainder, may be pleaded in bar for the same felony. Indeed, formerly it might be pleaded to any *other* felony; but by 7 & 8 Geo. 4, c. 28, s. 4, the attainder must be for the *same* offence, and not for any other.

Pardon may also be pleaded in bar, whether it be granted generally under an act of parliament, or particularly to the person who pleads it; but it must be pleaded, for the court cannot, *ex officio*, take notice of it; though, in case of an act of parliament, the judges are bound to take notice of it. A pardon, allowed before sentence, stops the judgment, and of course prevents the attainder and corruption of blood, which nothing but an act of parliament can restore. But a pardon is available after conviction. If none of these pleas be pleaded, or be overruled by judgment of *respondeat ouster*, the prisoner must then rely upon the general issue.

The general issue, or plea of *not guilty*, upon which plea alone the prisoner can receive his final judgment of death. To the plea of not guilty, the clerk of assize, or clerk of the arraigns, joins issue, *viâ voce*, on the part of the crown. Formerly, the

prisoner was asked how he would be tried; for anciently he might choose the ordeal, the corsned, by battle, or by jury *per patriam*. To this he generally answered, "By God and my country;" and the clerk replied, "God send thee a good deliverance." But now, by the 7 & 8 Geo. 4, c. 28, s. 1, pleading the general issue has the effect of referring the matter for trial by a jury. The ordeal and corsned were very long ago disused, but trial by battle was abrogated by the 49 Geo. 3, c. 46, abolishing appeals in criminal cases.

#### SECT. VII.—TRIAL AND CONVICTION.

[See 4 Black. Com. chap. 27; 4 Steph. Com. chap. 22.]

The trial of a peer of the realm must be *per pares*, or by his peers. 1, The peers need not all agree in their verdict; but the greater number, consisting of twelve at least, will conclude and bind the minority. 2, The trial may be in any county in England. 3, The peers are not sworn upon their trial, but give their judgment upon their honour *seriatim*, beginning with the youngest peer. 4, The prisoner cannot challenge any of his peers. 5, They give their verdict in the absence of the prisoner. 6, If the day appointed for execution should lapse before execution done, a new time may be appointed by the High Court of Parliament before which such peer shall have been attainted, or by the Court of Queen's Bench, if the Parliament be not then sitting. The trial *by jury*, or the country, is that trial by the peers of every Englishman, which is secured to him by the great charter. When, therefore, a prisoner on his arraignment has pleaded not guilty, and then put himself on his country, the sheriff must return a jury, who are sworn well and truly to

try the matter according to the evidence, and to give a true verdict thereon. By the 7 Anne, c. 21, and 6 Geo. 4, c. 50, s. 21, the prisoner is, in general, entitled, in cases of treason and misprision thereof, to have a copy of the indictment, a list of the witnesses to be produced against him, and of the jurors, delivered to him, ten days before the trial. This does not apply to attacks on the person of the sovereign, under 40 Geo. 3, c. 93, and 6 Vic. c. 51, or to 11 & 12 Vic. c. 12. A copy of the indictment is, in practice, always allowed in offences inferior to felony.

Formerly, counsel were not allowed to a prisoner indicted for felony, except to argue any question of law. Two counsel were allowed by the 7 Will. 4, c. 3, in treason; and by 20 Geo. 2, c. 30, in cases of parliamentary impeachment. And now, by 6 & 7 Will. 4, c. 114, all persons tried for any felony, and all accused persons in cases of summary conviction, may make full answer or defence by counsel, or, in courts where attorneys practise, by attorney.

*The jury.*]—The sheriff of the county must return a panel of jurors, that is, freeholders without just exception, from the body of the county. For this purpose, if the proceedings be in the Queen's Bench, a *venire facias* issues to the sheriff, as in civil cases; and the trial of a misdemeanor is had at *nisi prius*, unless a trial at bar be applied for and allowed; and in every capital offence the trial must be at bar, unless the attorney-general consents to the granting a *nisi prius*. But if the proceedings be before a court of oyer and terminer and gaol delivery, the justices direct a general precept to the sheriff, who returns forty-eight jurors to try all felons during the session. The jurors are to be sworn as they appear, to the number of twelve, unless they are challenged.



Challenges may be made, as in civil cases, to the whole array, or to the separate polls, either *propter honoris respectum*, *propter defectum*, *propter affectum*, or *propter delictum*. These are styled challenges *for cause*, and may be made without stint; but the prisoner is also entitled to *peremptory challenges*, without assigning any cause, which in treason may be to the number of *thirty-five*, and in felony (including murder) to *twenty*. This privilege of challenging peremptorily cannot be exercised on the part of the King, and he must wait until the panel be gone through before he can assign his cause. And an alien is entitled to have one half of the jury (if obtainable in the town or place where the trial is had) composed of aliens. When the jury are sworn, the next stage is to adduce evidence.

*Evidence.*—Evidence, so far as it more particularly concerns criminal cases, may be comprised under the following leading points: 1. In all cases of high treason, and misprision of treason, by statutes 1 Edw. 6, c. 12, and 5 & 6 Edw. 6, c. 11, *two* lawful witnesses are required to convict a prisoner, unless he shall willingly and without violence confess the same; and by 7 Will. 3, c. 3, the confession of the prisoner shall not countervail the necessity of two witnesses, unless such confession be made in open court. These two witnesses must be to the same overt act, or one witness to one overt act, and another witness to another overt act, of the same kind of treason. The necessity for two witnesses does not exist under 5 & 6 Vic. c. 51, for an attempt on the person of the sovereign. But under the 12 Vic. c. 12, the Crown and Government Security Act, two witnesses are necessary as to open and advised speaking. In prosecutions for *perjury*, there must, in general, be two witnesses. In all

other cases (except where expressly enacted to the contrary) one witness is sufficient.

2. The confession of the prisoner, whether taken before the magistrate on his examination, or in discourse with private persons, may be given in evidence against the party confessing (but not against others), except the confession was unduly obtained, under threats of punishment or promises of favour; but wherever a man's confession is made use of against him, it must be taken altogether, and not by parcels. All acts and facts done, although in consequence of a confession unduly obtained, may be given in evidence, although the confession itself cannot.

3. The deposition of a witness, taken upon oath, and subscribed by him before a magistrate or coroner, in the presence of the prisoner, may, by 7 Geo. 4, c. 64, ss. 2, 4, be given in evidence at the trial, if it be made out to the satisfaction of the court, that such witness is dead, or (as it should seem) unable to travel, or insane, or kept out of the way by the prisoner's procurement (see p. 421).

4. Hearsay evidence is not, in general, admissible, either for or against a prisoner; yet, on an indictment for murder, the dying declaration of the deceased, made under a sense of his approaching dissolution, as to the cause of his death, is admissible.

5. Comparison of hands is no evidence of a man's hand-writing in criminal cases; but they must be proved to be his hand-writing by persons who have seen him write, or have corresponded with him.

6. The husband and wife, being as one and the same person in affection and interest, can no more give evidence for one another, in any case, than for themselves; nor shall the one be admitted to give evidence against the other. Yet some exceptions

have been allowed to this general rule, in cases of evident necessity, as in treason, and forcible abduction, and marriage,

7. An accomplice in the crime charged against the prisoner may be a witness against him or for him; and it has been determined that the prisoner may strictly be convicted on the single unsupported testimony of such a witness: but the court seldom calls an accomplice to give his evidence, until some fair and unpolluted testimony be given of the fact charged against the prisoner; and where he stands unconfirmed, the jury will never give sufficient credit to a witness who swears in hopes of pardon, so as to convict a prisoner on his single uncorroborated testimony.

8. The want of natural understanding, or not possessing competent discretion, are good objections to a witness; and therefore infants, idiots, &c., under these disabilities, cannot be received. There seems to be no precise time fixed wherein children are excluded from giving evidence; but it will depend on the sense and understanding they appear to possess on being examined by the court. But it has been determined by all the judges, that a child of any age, although capable, cannot be examined without being sworn. But a man deaf and dumb, with whom communication can be made by signs, may be sworn and give evidence on a criminal prosecution.

*The verdict.*—A jury cannot in a criminal case give a privy verdict (p. 314); but an open verdict, may be either general, as guilty or not guilty; or special, setting forth all the circumstances of the case. A verdict of guilty may be set aside, and a new trial granted; but there has yet been no instance of granting a second trial, when the prisoner

was acquitted on the first. If the jury find a verdict of not guilty, the prisoner is for ever quit and discharged of the accusation; but if he be convicted, the judgment of the court regularly follows, unless suspended by the judgment being arrested, or a pardon be pleaded.

*Costs and Expenses.*—By the 7 Geo. 4, c. 64, the prosecutor and witnesses may be allowed their expenses, with compensation for their trouble and loss of time, in all cases of felony (except where otherwise expressly enacted, as under the 11 & 12 Vic. c. 12, *ante*, p. 355), and in the following misdemeanors,—an assault with intent to commit felony; an attempt to commit felony; a riot; a misdemeanor for receiving stolen property, knowing the same to have been stolen; an assault upon a peace officer in the execution of his duty, or any person acting in his aid; a neglect or breach of duty as a peace officer; an assault committed in pursuance of a conspiracy to raise the rate of wages; the knowingly obtaining property by false pretences; the wilful and indecent exposure of the person; and wilful and corrupt perjury, or subornation of perjury.

*Restitution of stolen property.*—The 7 & 8 Geo. 4, c. 29, s. 57, enacts, that if any person guilty of any felony or misdemeanor under that act, in stealing, taking, obtaining, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the court before whom any such person shall be so convicted shall

have power to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided always, that if it shall appear before any award or order made that any valuable security shall have been *bond fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bond fide* taken or received, by transfer or delivery, by some person or body corporate for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award or order the restitution of such security.

#### SECT. VIII.—JUDGMENT.

[See 4 Black. Com. chap. 29; 4 Steph. Com. chap. 23.]

*Benefit of clergy.*—Formerly, a person convicted might have avoided judgment of death by praying the benefit of clergy, which was an ancient privilege of the church, where one in orders claimed to be delivered to his ordinary, to purge himself of a felony; and after much contention between the ecclesiastical and temporal courts, it was at length agreed, that all *clerks* (among whom were reckoned *every person who could read*) who were indicted for any felony should first be arraigned in the secular jurisdiction, and then claim his benefit of clergy, either by way of declinatory plea, or in arrest of judgment. When this claim was allowed, the clerk was delivered to the ordinary to make his purgation, which was done by exculpating himself on his own oath, and the oaths of twelve compurgators; and by this purgation, as it was called, the party easily ob-

tained his liberty. Various statutes were passed to regulate the punishment of persons entitled to this benefit; but it is unnecessary to mention them, as the benefit of clergy is now, by the 7 & 8 Geo. 4, c. 28, s. 6, and 4 & 5 Vic. c. 22, wholly taken away.

*Judgment.*]—Upon a capital charge, when the jury have brought their verdict of “guilty,” in the presence of the prisoner, he is either immediately, or at a convenient time after, asked by the court if he has anything to offer why judgment should not be awarded against him; and in this stage of the proceeding it is that motion must be made in arrest of judgment, either by pointing out some blemish on the face of the record, or pleading a pardon; but if these resources fail, the court proceeds to judgment.

*Punishments.*]—The judgment is the award of punishment which the law has annexed to the crime, and which has been mentioned, together with the crime itself, in the previous pages. This ought regularly to be recorded. Some punishments are by the common law, but more frequently by statutes. In misdemeanors, it is generally fine or imprisonment, particularly at the common law: in felonies, it is occasionally death, but usually transportation or imprisonment, sometimes solitary, and with or without hard labour or whipping. But by 1 Vic. c. 90, s. 5, no offender shall be kept in solitary confinement for more than a month at a time, or than three months in the space of one year. And by 1 Geo. 4, c. 57, no female shall be whipped, either publicly or privately, but in lieu thereof, she may be confined to hard labour for between one and six months, or solitarily confined for not more than seven days at any one time.

Transportation was unknown to the common law, and is now chiefly regulated by the 5 Geo. 4, c. 84, extended to Ireland by 10 & 11 Vic. c. 67. The judgment authorises the offender to be conveyed to such place within the Queen's dominions as the crown may appoint (and may be afterwards removed to any prison in Great Britain). The offender may be kept to hard labour (but not females), which will reckon in discharge or part discharge of the sentence. By the 9 & 10 Vic. c. 24, where a party may be transported for a longer term than seven years, or imprisoned for not less than two years, the court may award a sentence of transportation for not less than seven years, or imprisonment for not more than two years, with or without hard labour. The preceding provisions must be borne in mind when reading the various punishments annexed to offences.

As to felonies where no punishment is expressly provided, the 7 & 8 Geo 4, c. 28, s. 2, inflicts transportation for seven years, or imprisonment for not more than two years, with or without hard labour, solitary confinement, and whipping of males. By s. 7, a second felony, not punishable with death, subjects the offender to transportation for life, or not less than seven years, or to imprisonment for not less than four years, and whipping. (But see 9 & 10 Vic. c. 21, *supra*.)

As to the case of an offender already suffering punishment, the 7 & 8 Geo. 4, c. 28, s. 10, enacts, that wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, the court may award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where

such person shall be already under sentence, either of imprisonment or of transportation, the court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could otherwise be awarded.

*Forfeiture.*—By attainder in high treason, the offender forfeits all his freehold lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on freehold lands and tenements which he had at the time of the offence committed, or at any time afterwards, to the crown for ever; and also, the profits of all freehold lands and tenements which he had in his own right for life or years, so long as such interest shall subsist; but a wife's jointure is not forfeited, although her dower is. This forfeiture relates back to the time of the offence committed. Lands, chattels, and stock belonging to any person as *trustee*, do not escheat or become forfeited by attainder for any offence, but remain in such trustee, or descend or vest in his representative, as if no such attainder had taken place (4 & 5 Will. 4, c. 23). In felony, the offender forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life; and, in the particular instance of *murder*, after his death, all his freehold lands and tenements in fee-simple, but not those in fee-tail, to the crown for a year and a day; and the king may commit therein what waste he pleases. These forfeitures also relate back to the time of the offence committed.—A *felo de se* forfeits no lands of in-



heritance or freehold, for he never is attainted as a felon.—The forfeiture of goods and chattels accrues in high treason, misprision of treason, felonies of all sorts, self-murder, simple larceny, and striking, &c., in Westminster Hall. Lands, therefore, are forfeited upon attainder, and not before; but goods and chattels are forfeited upon conviction. In outlawry for treason or felony, land is forfeited only by the judgment, but goods and chattels by the *exigent*.—The forfeiture of goods and chattels only relates to the time of conviction, except in the case of *felo de se*, when it shall relate to the act done which was the cause of the death.

*Corruption of blood.*—Corruption of blood is another unavoidable consequence of attainder for treason or murder, but not for any other offence (54 Geo. 3, c. 145); so that such an attainted person cannot inherit lands or hereditaments from his ancestor, and formerly could not transmit them to any heir; for the person attainted obstructed all *descents*.

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#### SECT. IX.—OF REVERSAL OF JUDGMENT.

*Without writ of error.*—A judgment may be reversed for matters not apparent on the face of it, by alleging a *diminution* of the record.

*Writ of error.*—The judgment may also be reversed by writ of error to the Queen's Bench, and from thence to the House of Lords. Writs of error in misdemeanors are allowed only on sufficient probable ground shown to the Attorney General. By 8 & 9 Vic. c. 68 (amended by 9 & 10 Vic. c. 24), where judgment shall have been given for a mis-

demeanor, and the defendant shall have obtained a writ of error to reverse it, execution thereon shall be stayed until such writ of error shall be finally determined; subject, however, to a proviso that no execution shall be stayed until the defendant shall be bound by recognisance, with two sufficient sureties, to prosecute the writ of error with effect; and, in case the judgment be affirmed, forthwith to render the defendant to prison according to the judgment. In capital cases, writs of error are only allowed *ex gratia*.

*Act of parliament.*—The most effectual way of reversing an attainder is by act of parliament, which, however, is a very rare case.

When judgment or conviction is reversed, the proceedings are all set aside, and the party is restored in his credit, capacity, blood, and estates. He is, however, liable to another prosecution for the same offence; for the first being erroneous, he never was in jeopardy thereby.

Parties were obliged to derive a title through them to a remote ancestor. But now, by s. 10 of 3 & 4 Will. 4, after the death of a person attainted, his descendants may trace their descent through such attainted person, provided he was dead before such descent took place.

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#### SECT. X.—OF REPRIEVE AND PARDON.

[See 4 Black. Com. chap. 31; 4 Steph. Com. chap. 25.]

The only other remaining ways of avoiding the execution of the judgment are by a reprieve or a pardon; the former of which is temporary only, the latter permanent.

*Pardon.*—We have already seen that a pardon may be pleaded on arraignment, or in arrest of judgment; and we have now to add, that it may be pleaded in bar of execution. We may here appropriately notice some matters relating to pardons:—

I. The sovereign may pardon all offences, except, 1, the committing any man to prison out of the realm, which is made a *præmunire*; 2, where private justice is principally concerned; though by the Larceny Act, 7 & 8 Geo. 4, c. 29, s. 69, the sovereign may extend his mercy to any person imprisoned by virtue of that act, though for non-payment of money to an individual. He cannot pardon a nuisance so as to prevent an abatement of it, nor an offence against a popular or penal statute after information brought. And a pardon is no bar to an impeachment.

II. The pardon must be under the great seal, or warrant under the sign manual. In general, the offence intended to be pardoned should be particularly mentioned (*b*).

III. A pardon by act of parliament is more beneficial than by the sovereign's charter; for the court must take *ex officio* notice of it without pleading, and no laches will deprive the offender of its benefit.

IV. The effect of the sovereign's pardon is to acquit the party of all corporal penalties and forfeitures annexed to the offence, and to give him new credit and capacity. If the pardon be not till after attainder, nothing but an act of parliament can restore the party's corruption of blood. A pardon may be *conditional* upon the performance of any terms the sovereign may annex: thus, felons are constantly pardoned on condition of being confined to hard labour for a given time, or of transportation to some free country for life or for a term of years, or on condition of not returning to England, or other the country where the offence was committed. The

performance of the condition has, by 7 & 8 Geo. 4, c. 28, s. 13, and other statutes, the effect of a pardon under the great seal. And by 9 Geo. 4, c. 32, s. 3, enduring the punishment for a felony not capital, has the same effect as a pardon under the great seal as to the particular offence, except so as not to diminish the punishment for a subsequent conviction for any other felony.

*Reprieve.*—A reprieve is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. The causes for reprieve are various; as, where the judges are not satisfied with the verdict, or the evidence is suspicious, or the indictment insufficient; or where a woman between judgment and execution proves to be with child; or if an offender become *non compos*.

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#### SECT. XI.—EXECUTION.

[See 4 Black. Com. chap. 32; 4 Steph. Com. chap. 26.]

In all cases, as well capital as otherwise, execution must be performed by the legal officer, the sheriff, or his deputy. The usage is, in the country, for the judge to sign the calendar, or list of the prisoners' names, marking opposite to each the punishment he is to receive. Upon the receipt of this *warrant*, for it is the only one the sheriff has, he is to do execution in a convenient time. The sheriff cannot alter the manner of execution, nor can the king change the punishment of the law, though he may (it is thought) mitigate it.

## CHAP. L.

## COURTS OF JUSTICE.

[See 3 Black. Com. chaps. 3—6; 4 *Id.* chap. 19; 3 Steph. Com. Book V. chaps. 8—6; 4 *Id.* chap. 14.]

A court is a place where justice is judicially administered. The King being the supreme magistrate of the kingdom, and intrusted with the whole executive power of the law, no court whatever can have any jurisdiction, unless it some way or other derive it from the crown. The only methods by which any court of judicature can exist, are either by act of parliament, by letters patent, or by prescription; in the two former of which the King's consent is expressly given, in the latter it is implied. In contemplation of law, the King is always present in his courts; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative. Of the variety of courts which the law hath appointed for the administration of justice, some are constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal, and by way of review; but there is one distinction runs throughout them all, *viz.* that some of them are courts of record, others not of record. They are also divided into superior and inferior courts; and are further distinguished, according to the kind

of jurisdictions they respectively possess, by the appellation of the civil, ecclesiastical, military, maritime, special, and criminal courts.

*Courts of record and not of record.*—A court of record is that which hath power to hold plea, according to the course of the common law, and whose acts, memorials, or the proceedings in the courts are recorded or enrolled in parchment. These rolls, being the memorials of the judges, are of such uncontrollable credit, that they admit of no proof to the contrary, insomuch that they are to be tried only by themselves; for otherwise there would be no end to controversies. If the judges err, a writ of error lies only from a court of record.

Courts not of record, where the proceedings are according to the course of the common law, are such where the acts of the court are not enrolled in parchment; as in the original county court, hundred court, and court baron. Here the proceedings may be denied, and tried by a jury; and upon the judgments of such courts a writ of error does not lie, but a writ of false judgment.

A court that is not of record cannot impose a fine, or imprison, whilst such a power is necessarily incident to a court of record. And the erection of a new jurisdiction, with power of fine or imprisonment, makes it instantly a court of record.

Some jurisdictions are ecclesiastical, some temporal. Of these, some may be primitive, or without commission; some derivative and delegated by commission; some to enquire, hear, and determine; some to enquire only; and some are guided by one law, and some by another. In treating of courts we shall consider,—1. The public courts of Common Law: 2. The Ecclesiastical Courts: 3. The Military Courts: 4. The Maritime Courts: 5.

Courts of a special Jurisdiction: 6. Courts of Equity and Bankruptcy; and lastly, Courts of a Criminal Jurisdiction.

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SECT. I.—PUBLIC COURTS OF COMMON LAW.

The public courts of Common Law are, to begin with the lowest of them:—

*The Court of Piepoudre.*—This court is incident to every fair and market, although by custom it may exist without fair or market, and is so called because for contracts made or injuries committed concerning the fair or market, justice shall be done as speedily *as the dust can fall from the feet*. It is a court of record, of which the steward is the judge, there being no suitors; and it hath cognizance of all matters of contract that can possibly arise within the precinct of that fair or market; and the cause of action must arise, be complained of, heard, and determined the same day, and within the precinct of the same fair or market.

*Court Baron.*—The court baron is a court incident to every manor. It is not a court of record, nor can it hold plea of debt or trespass, except where the debt or damage is under forty shillings. It is held before the steward of the manor, who is, however, only as the registrar, for the suitors are in law the judges of the court. This court, which cannot be holden out of the manor, is of two natures. The first is by the common law called the freeholders' court, or court baron, and this is the court of which we at present treat. The second is a customary court, and concerns the copyholders only, and in which their estates are transferred (see p. 226). The proceedings in personal actions may

be removed into the superior courts by writs of pone, or *accedas ad curiam*. After judgment given, a writ also of false judgment lies to the courts at Westminster.

*The Hundred Court.*]—This court was derived from the county court, and has the same jurisdiction; it is in fact only a larger court baron held for all the inhabitants of a particular hundred instead of a manor. It is no court of record, and cannot hold plea of debt or trespass, unless under forty shillings.

*County Court.*]—We must distinguish between the old, or original county court, and what are usually termed the *new* county courts, created by 9 & 10 Vic. c. 95, though in truth, the latter would be more properly designated as branches of the county courts. The original county court is a court incident to the jurisdiction of the sheriff. By the escheat of earldoms and baronies, the tenants of such earls and barons were to hold from the King; and not being qualified to sit in the King's own court, they composed a court in each county, under the array of the sheriff, or the King's bailiff: those were the *pares* of the county court; and hence it is that it has ever since been held, that the sheriff is not the judge, but only the suitors. This court is not a court of record, but it might have held pleas of debt or damage under forty shillings. Indeed, by a particular writ, called a *justicies*, this court held plea of goods, debts, &c. of any value. But this must be understood of debts arising *ex contractu* only, and not of those which are *ex delicto*, as upon the statute of tithes, &c. In replevin also, by writ or plaint upon the statute of Marlbridge, this court held plea of goods and chattels above the value of forty shillings. The old



county courts, however, fell into disrepute, and many acts were passed for establishing courts of conscience, or requests, which in their turn were found open to objection, particularly on account of their limited jurisdictions and inefficient judges. These are all, or nearly all, superseded by the new County Courts Act, the 9 & 10 Vic. c. 95, which establishes an uniform jurisdiction throughout England, for (generally speaking) debts not exceeding £20, and damages not exceeding £5. It likewise provides for a higher order of judges. We may remark, that the act does not abolish the old county court, but it gives to the new county courts the jurisdiction of the old courts as to claims coming under the cognisance of the new courts, and at the same time enlarges the extent of the new jurisdiction. The counties are divided into districts, and the *county court for the recovery of debts and demands under the act* is held in each of such districts. Each court is a court of record, which, as we have seen, the original county court is not. For all purposes, except those within the jurisdiction of the new courts, the old county court is to be holden as if the act had not been passed.

The new courts have jurisdiction to hold pleas in personal actions where the debt or damage claimed is not more than £20, and that, too, whether on balance of account or not, and it is provided, that the plaintiff may abandon the excess where his demand is beyond £20; in which case, however, the judgment of the court will be in full discharge of all demands in respect of such cause of action. The jurisdiction extends to the recovery of a demand (not exceeding £20) which is the whole or part of the unliquidated balance of a *partnership* account, or the amount, or part of the amount, of a *distributive share* under an intestacy, or of any le-

*gacy* under a will. But it especially provides that the courts are not to have cognisance of ejectment, or of any action in which the title to any corporeal or incorporeal hereditament, or to any toll, fair, market or franchise, shall be in question, or in which the validity of any devise, bequest or limitation under any will or settlement, may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or seduction, or breach of promise of marriage. So the *concurrent* jurisdiction of the superior courts is preserved where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business, or where an officer of the court is a party, except in respect of any claim to any goods and chattels taken in execution, or the proceeds or value thereof. There are some provisions as to *replevins*, it being provided that all actions of replevin in cases of distress which shall be brought in the county court, shall be brought without a writ in a court held under the act, and the plaint is to be entered in the court holden under the act for the district wherein the distress was taken. But replevins may be removed if the amount exceed £20, or the title is in question, on the party becoming bound with two sureties to prosecute the suit with effect, and without delay. Though ejectments may not be brought, yet possession of tenements of not greater value or rent than £50 may be recovered in the county court by plaint. It may be remarked, that no plaint can be removed into a superior court, unless the debt or damage claimed exceed £5, and, even in that case, not without the leave of the judge of the superior court, on such terms as to costs, security, &c., as he shall

think fit. Where an action is commenced in a superior court for a matter cognisable by these inferior courts, and the plaintiff recovers less than £20 in actions founded on contract, or less than £5, if founded on tort, he shall not recover costs, unless the judge trying the cause shall certify on the back of the record, that the action was fit to be brought in such superior court. As to the *judges* under the act, they are appointed by the Lord Chancellor and must be barristers of seven years' standing, or barristers having practised as barristers and special pleaders for seven years, or barristers or attorneys who, under certain acts, shall have been appointed to preside in any of the abolished courts.

As to the *mode of proceeding*, it is provided that on the plaint being entered, a summons is to issue, and be served on the defendant. No pleadings are allowed, but the defendant, if he intend to avail himself of any special defence, must give notice thereof to the clerk of the court, who is to communicate the same to the plaintiff. In actions above £5, either party may require a jury of five, otherwise the judge will decide the case by himself. The parties to the action, their wives, &c., may be examined as witnesses.

As to the *practitioners of the court*, it provides, that no person shall be entitled to appear for any other party to any proceeding unless he be an attorney of one of the superior courts, or a barrister at law instructed by such attorney, or by leave of the judge, any other person; but no barrister, attorney, or other person, except by leave of the judge, shall be entitled to be heard to argue any question as counsel. And no attorney shall be entitled to any sum unless the debt or damage claimed be more than 40s., or to have more than 10s. for his fees and costs, unless the debt or damage

claimed shall be more than £5, or more than 15s. in any case; and in no case shall any fee exceeding £1 3s. 6d. be allowed for employing a barrister as counsel in the cause. It has been decided, that the attorney's fee includes, not only his charge for appearing in court, but also for the steps and preparations prior thereto.

The courts of common law which we have just mentioned are called inferior courts, whilst the three following, namely, the Common Pleas, the Queen's Bench, and the Exchequer, are termed the superior courts of common law, at Westminster. They are said to be common law courts to distinguish them from courts of equity, &c., and they are said to be "at Westminster" to distinguish them from the county palatine courts, which are also superior courts of common law.

*Common Pleas.*—The Court of Common Pleas, on the division of the *aula regis* into four distinct courts, towards the close of the Norman period, was established as one of the superior courts of record in the kingdom, for the determination of pleas merely civil; and because all civil causes between subject and subject were to be determined in this court, it was styled *communia placita*, or *common pleas*. Originally this court was ambulatory, and removed with the King wherever he went; but by *Magna Charta communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco*. The jurisdiction of this court was so important, that Sir Edward Coke calls it the lock and key of the common law; for herein were necessarily brought real actions whereupon fines and recoveries passed, as also all other real actions by original writs. But fines and recoveries are abolished by the 3 & 4 Will. 4, c. 74. (p. 210), and certain other modes of as-

surance substituted for them : over these the court exercises exclusive jurisdiction, as it does over the real actions not done away by the 3 & 4 Will. 4, c. 27, s. 36. This court has no jurisdiction in criminal cases, nor in revenue causes. The judges of the court are at present five in number, one chief, and four *puisne* justices, created by the Queen's letters patent, who sit every day in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed. These it takes cognizance of, as well originally, as upon removal from the inferior courts before mentioned. But a writ of error in the nature of an appeal lies from this court into the court of Exchequer Chamber.

*The Court of Queen's Bench.*—So called because the Sovereign used formerly to sit there in person, the style of the court still being *coram ipsâ reginâ*. It is one of the superior courts of common law, consisting of a chief justice and four *puisne* justices, who are by their office the sovereign conservators of the peace and supreme coroners of the land. This court, from the very nature and constitution of it, cannot be fixed to any certain place, but may follow the Queen's person wherever she goes ; for which reason all original process issuing out of this court in the Queen's name is returnable "wheresoever we shall then be in England." This court has a peculiar jurisdiction not only over all capital offences, but over all other misdemeanors of a public nature, tending either to a breach of the peace, or to oppression ; and it is not material whether such offences, being manifestly against the public good, directly injure any person or not. The jurisdiction of this court is so very high and transcendent, that it keeps all inferior jurisdictions

within the bounds of their authority; and may either remove their proceedings to be determined here, or *prohibit* their progress below. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition. On the civil side it hath an original jurisdiction, and cognisance of all personal and mixed actions. The peculiarity of this court, then, consists in its criminal jurisdiction, which neither the Common Pleas nor Exchequer can exercise. The Court of Queen's Bench is likewise a court of appeal, into which may be removed, by writ of error, all determinations of all inferior courts of record in England, except where a writ of error is taken away by statute. A writ of error lies from the county palatine courts, which are not, however, as we have seen, inferior courts. But the judgment of the Court of Queen's Bench may be appealed against by writ of error into the Court of Exchequer Chamber, and from thence into the House of Lords.

*Exchequer.*—The Court of Exchequer is an ancient court of record, principally, in its origin, for all matters relating to the revenue of the crown. It is called the exchequer, *scaccarium*, from the chequered cloth, resembling a chess board, which covers the table there; and on which, when certain of the Queen's accounts are made up, the sums are marked and scored with counters. This court formerly acted in the double capacity of a court of law and a court of equity also; but by the 5 Vic. c. 5, the equity jurisdiction was done away with, and transferred to the Court of Chancery. The common law part of this court, which is exercised by the barons of the Exchequer only, being estab-

lished to adjust and recover the King's revenue, was originally confined to such persons only as were indebted to or accountants with the Crown, and to the officers of the court, but all kinds of personal suits may now be prosecuted in the court of Exchequer by any person whatsoever. The judges consist of a chief baron and four *puisne* barons. From this court a writ of error lies into the court of Exchequer Chamber; and after this, but not before, a writ of error lies in the *dernier ressort* to the House of Lords.

*Exchequer Chamber.*]—This is merely a court of appeal. It has no special judges of its own, but the judges of the Court of Queen's Bench, Common Pleas, and Exchequer preside, according to the court from which the appeal comes. In fact the court has no permanent existence, but is called into existence with each appeal. It is regulated by the 11 Geo. 4, and 1 Will. 4, c. 70, s. 8, according to which the judgments of each of the superior courts in all suits whatever are subject to revision by the judges of the other two, sitting collectively as a court of error for that purpose in the Exchequer Chamber. Thus on a writ of error from the Queen's Bench, the judges of the court of Common Pleas and Exchequer form the Exchequer Chamber, whilst on one from the Common Pleas the judges of the other two courts hear the appeal, and on error from the Exchequer, the judges of the Queen's Bench and Common Pleas form the court of Exchequer Chamber. From this court an appeal lies to the House of Lords.

*House of Lords.*]—The House of Peers is the supreme court of judicature in the kingdom, but it has no original jurisdiction over causes, and can

only take notice of them on appeals and writs of error, to rectify any injustice or mistake of the law committed by the courts below.

*Assize and Nisi Prius.*—The courts of Assize and Nisi Prius it may also be proper to mention in this place, as courts of general jurisdiction and use, which are derived out of and act as collateral auxiliaries to the superior courts of common law. Justices of assize derive their authority wholly from the commission under which they act. These justices of assize came into use in the room of the ancient justices in eyre, who were regularly established in the year 1176 by the parliament of Northampton. The present justices of assize and *nisi prius* are derived from the statute Westminster 2, 13 Edw. 1, c. 30, and 14 Edw. 3, c. 16, and must be one of the Queen's justices, or a baron of the exchequer, who are twice in every year sent all round the kingdom (excepting only London and Middlesex, where courts of *nisi prius* are holden in and after every term, before the chief or other judges of the superior courts); and by the writ of *nisi prius* which is annexed to the commission of assize, they are directed to try, by a jury of the respective counties, the truth of such matters of fact, as are then under dispute in the courts of Westminster Hall. This was contrived for the ease of the subject, that the jury and witnesses might not be obliged to come out of their proper counties. The judges make their circuits in the respective vacations after Hilary and Trinity terms (which are, therefore, termed "issuable terms"), and upon these occasions to the writ of *nisi prius* are added the commission of the peace, a commission of *oyer and terminer*, and a commission of general *gaol delivery*,



which will be explained when we treat of courts of criminal jurisdiction.

*Counsel.*.]—Here it will be proper to notice that a party to an action may act by himself if he please, but if he do not, then he is bound to employ the recognised practitioners of the court; or, at least, any others acting as such for reward would be subject to punishment. There are two sorts of practitioners recognised by the courts, namely, counsel and attorneys. Counsel, otherwise called barristers at law, advise the attorney, prepare the pleadings, and act as advocates in the courts; for all which they receive fees; which, however, are only honorary, and not recoverable as such. Some of these are serjeants; and they had, till lately, exclusive audience in the Common Pleas; but now, by the 9 & 10 Vic. c. 54, all barristers-at-law have equal rights and privileges of practising, pleading, and audience in the Common Pleas with serjeants-at-law.

*Attorneys.*.]—Attorneys are officers of the court, but are employed by the litigants to conduct the various proceedings in an action or other law business. To become an attorney, the party must previously have served under articles for a term of five years (except he have taken his degree, when the time is three years), and have undergone a satisfactory examination as to his fitness and capacity. He must, after admission, take out an annual certificate, upon which he pays every year £12 in town and £8 in the country (except for the first three years after admission, when the sum is one half). The attorney's duty is to advise the client, and to obtain the assistance of counsel where necessary. He is responsible to the client for the proper

conduct of his affairs, and is entitled for his services to proper costs, for the ascertainment of which, in cases of dispute, there are proper officers, termed masters. He is punishable summarily by the courts for misconduct.

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## SECT. II.—OF COURTS ECCLESIASTICAL.

[See 3 Black. Com. chap. 5; 3 Steph. Com. chap. 5.]

*Archdeacon's Court.*]—The archdeacon's court is the most inferior court in the whole ecclesiastical polity. This court is holden before his official, in such place as the archdeacon, either by prescription or composition, hath jurisdiction in, over spiritual causes within his archdeaconry. He is called *oculus episcopi*, and exercises an ecclesiastical jurisdiction, either concurrently with the bishop, or exclusively. By 24 Hen. 8, c. 12, an appeal lies from this court to that of the bishop.

*Consistory Court.*]—The consistory court of every bishop of every diocese within the realm, is holden before the bishop's chancellor in the cathedral church, or before his commissary in places within his diocese far remote and distant from the bishop's consistory. By 24 Hen. 8, c. 12, an appeal lies to the archbishop of each province respectively.

*Court of Arches.*]—The Court of Arches, *curia de arcubus*, because it was anciently held in Bow church, the steeple of which is built on pillars that are formed archwise, is a court of appeal belonging to the archbishop of each province. The judge of this court is called the *dean of the arches*, though properly the dean of the arches is the judge of a deanery consisting of the thirteen peculiar parishes

exempted from the bishop of London, whereof Bow church is the chief. These peculiars are annexed to the officialty, and the jurisdiction more properly belongs to the principal official. From this court there lies an appeal to the privy council.

*Court of Peculiars.*—The Court of Peculiars is a branch of and annexed to the Court of Arches. It has a jurisdiction over all those parishes, dispersed through the province of Canterbury, in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only. All ecclesiastical causes arising within these peculiar or exempt jurisdictions, are originally cognizable by this court, from which an appeal lies to the Court of Arches.

*Prerogative Court.*—The Prerogative Court of the archbishop is that court wherein all testaments are proved and all administrations granted, where the party dying hath *bona notabilia* in some other diocese than where he dies; and it is so called from the archbishop having a prerogative throughout his whole province for such purposes. An appeal lies from this court to the privy council.

*Privy Council.*—Formerly, the great court of appeal in all ecclesiastical causes was the Court of Delegates, the sentence of which court was, in extraordinary cases, revised by Commission of Review. But now, appeals from ecclesiastical courts are to the Queen in council, and are then referred to a judicial committee of the privy council. (See pp. 54, 55.)

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## SECT. III.—COURTS MILITARY.

[See 3 Black. Com. chap. 5; 3 Steph. Com. Bk. V., chap. 3.]

*Court of Chivalry.*—The court of chivalry was originally held before the lord high constable and earl marshal of England jointly, but subsequently before the earl marshal only. But this court has now grown entirely out of use.

## SECT. III\*.—MARITIME COURTS.

[See 3 Black. Com. chap. 5; 3 Steph. Com. Bk. V., chap. 5.]

*Admiralty Court.*—The Court of Admiralty is a court for all maritime matters arising upon the high seas, and its jurisdiction is derived from the king, to protect his subjects from pirates. This jurisdiction is exercised by the judge of the admiralty, who has, besides, a special commission from the crown to adjudicate on prize of war, and power also to decide on questions of booty of war (*i. e.*, prize on shore) when specially referred to him. The proceedings of this court are, according to the methods of the civil law, like those of the ecclesiastical courts; upon which account it is usually holden at the same place with the superior ecclesiastical courts, at Doctors' Commons. It is no court of record, any more than the spiritual courts. An appeal lies from the Court of Admiralty to the Queen in council, and is then referred to the judicial committee of the privy council.

*Vice-admiralty courts.*—In the Queen's possessions abroad there are also courts with jurisdiction over maritime causes, including those relating to prize, under the denomination of Courts of Vice-

Admiralty. There is also an appeal to the judicial committee of the privy council, except there be (3 & 4 Will. 4, c. 41) a treaty with a foreign power to the contrary.

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#### SECT. IV.—COURTS OF A SPECIAL JURISDICTION.

[See 3 Black. Com. chap. 6; 3 Steph. Com. Bk. V., chap. 6.]

Courts of a private or special jurisdiction are,  
1. The forest courts; including the courts of attachments, regard, siveinmote, and justice-seat, all of which are now in disuse. 2. The court of commissioners of sewers, which is a temporary tribunal erected by virtue of a commission under the great seal, at the nomination of the lord chancellor, lord treasurer, and chief justices: their jurisdiction is to overlook the repairs of sea banks and sea walls, the cleansing of rivers, public streams, ditches, and other conduits whereby any waters are carried off. It is a court of record, and may assess rates and distrain for them. It is subject to the control of the Queen's Bench. 3. The Marshalsea and the Palace Court have jurisdiction twelve miles round the Queen's palace: they are held conjointly, once a week, in the borough of Southwark. A writ of error lies from thence to the court of Queen's Bench. 4. The court of the Duchy of Lancaster. 5. The courts of the counties palatine, and other royal franchises. 6. The stannary courts of Cornwall and Devon, to administer justice among the miners. 7. The courts of London, and other corporations. 8. The courts of the two universities, which enjoy the sole jurisdiction, in exclusion of the Queen's courts, over all civil actions and suits whatsoever, when a scholar or privileged person is one

of the parties, except in those cases where the right of freehold is in question. This jurisdiction is expressly reserved from the operation of the New County Courts Act.

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## SECT. V.—COURTS OF EQUITY.

[See 3 Black. Com. ch. 4; 3 Steph. Com. Bk. V., ch. 4.]

The Court of Chancery is one of the Queen's superior and original courts of justice, and takes its name of Chancery, *Cancellaria*, from the judge who presides there, who, according to Sir Edward Coke, is so termed *à cancellendo*, from *cancelling* the King's letters patent, when granted contrary to law, which is the highest point of his jurisdiction. The origin of this court is of very high antiquity, and the power of the chancellor was formerly very considerable. But towards that part of the Norman period when the power of the grand justiciary was broken, and the *aula regis* was divided into separate and distinct jurisdictions, it is highly probable that the authority of the chancellor became also considerably circumscribed. At present the office of chancellor or lord keeper (whose authority, by 5 Eliz. c. 18, is declared to be exactly the same) is created by the mere delivery of the Queen's great seal into his custody, whereby he becomes, without writ or patent, an officer, even at this day, of the greatest weight and power of any now subsisting in this kingdom, and superior in point of precedency to every temporal lord. He is a privy councillor by his office, and prolocutor of the House of Lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. He is the keeper of the king's conscience; visitor, in right of the king, of all

hospitals and colleges of the king's foundation; and patron of all the king's livings not exceeding twenty pounds a year in the king's books. He is the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom; and all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the court of chancery, wherein there are two distinct tribunals, the one ordinary, being a court of common law; the other extraordinary, being a court of equity (a).

*Common law jurisdiction.*—The chancellor, having retained, upon the division of the courts, the custody of the great seal, retained also the right of affixing it to all patents, commissions, and writs; and hence this court is considered at this day as the great shop of justice, out of which all original writs issue; and from this court do also issue all commissions of charitable uses, bankrupts, sewers, idiots, lunatics, &c. This ordinary legal court is much more ancient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias*; to repeal or cancel the king's letters patent, when made against law, or upon untrue suggestions; and to hold plea of petitions, *monstrans de droit*, traverses of offices, and the like, when the king hath been advised to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right. (pp. 57, 293). It also appertains to this court to hold plea of all personal actions, where any officer or minister of the court is a party (b). But if any cause come to issue in this court, that is, if any fact be disputed between the parties, the chancellor cannot try it, having no power to summon a jury; but must deliver the record into the court of Queen's Bench, where it shall be tried by the country, and

judgment shall be there given thereon (c). And when judgment is given in chancery upon demurrer, or the like, a writ of error, in nature of an appeal, lies out of this ordinary court into the court of Queen's Bench.

*Equitable jurisdiction.*]—The extraordinary or equitable jurisdiction of the court of Chancery, and all the other courts of equity in this kingdom, derive their establishment from so remote an antiquity, that those who have attempted accurately to describe these courts have failed; and, indeed, the distinction between law and equity, as administered in the different courts of justice in this country, is not at present known, nor seems to have been known in any other country at any time. It is certain, however, that the court of Chancery, from the time of the dissolution of the *aula regis*, has exercised a jurisdiction in matters of equity; and it is now become the court of the greatest judicial consequence, although in its proceedings by English bill it is not a court of record. From this court of equity in chancery, as from the other superior courts, an appeal lies, as we have seen (p. 337), to the House of Peers.

*Equity judges.*]—Besides the Lord Chancellor, there are the following judges in Chancery, namely, the Master of the Rolls, the Vice-Chancellor of England, and two additional Vice-Chancellors, lately created (d).

The Lord-Chancellor in general takes only appeals, and thus the original hearing of a cause is confined to the Master of the Rolls or one of the Vice-Chancellors. The suitor may select which of these tribunals he pleases, subject to the cause



being assigned to a different court by order of the Lord Chancellor, &c. (e).

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SECT. VI.—COURTS OF CRIMINAL JURISDICTION.

[See 4 Black. Com. chap. 19; 4 Steph. Com. ch. 14.]

*Court of Parliament.*—The High Court of Parliament is the supreme court of the kingdom, not only for the making, but also for the execution of laws, by the trial of great offenders, whether lords or commoners, in the method of Parliamentary impeachment. A commoner cannot, however, be impeached before the lords for any capital offence, but only for high misdemeanors. A peer may be impeached for any crime. By 12 & 13 Will. 3, c. 2, no pardon under the great seal shall be pleadable to an impeachment by the Commons of Great Britain in Parliament. The articles of impeachment (a kind of bill of indictment) is found by the House of Commons, and tried by the peers; and the King, by his commission under the great seal, reciting the impeachment, usually constitutes some peer high steward of the kingdom; but this appointment of a lord high steward does not alter the nature and constitution of the court; it is still the High Court of Parliament, in which every temporal peer has a right to be present during every part of the proceeding, and to vote upon every question, both of law and fact, the decision of which is guided by the majority of voices, and in which decision the lord high steward votes merely as a peer, but in no other right.

*Court of the Lord High Steward.*—The Court

of the Lord High Steward of Great Britain is a court instituted for the trial of peers indicted for treason or felony, or for misprision of treason or felony. When, therefore, such an indictment is found by a grand jury of freeholders in the Queen's Bench, or at the assizes before a judge of oyer and terminer, the Queen, by her commission under the great seal, reciting the indictment, constitutes some peer high steward of the kingdom *pro hac vice*, and by the same commission gives him power to receive and proceed on such indictment, and requires the peers to be attendant on him, and the prisoner to be brought before him. The indictment is then removed into this court by writ of certiorari. By the 7 Will. 3, c. 3, all the peers who have a right to sit and vote in Parliament, shall be summoned at least twenty days before such trial, to appear and vote therein; and every lord appearing shall vote in the trial of such peer, first taking the proper oaths. The decision in this court is by the majority, which must, however, consist of twelve at the least. During the session of Parliament the trial of an indicted peer is not properly in the Court of the Lord High Steward, but before the court last mentioned of *our lady the Queen in Parliament*. In such case the peers are the judges both of law and of fact, and the high steward votes with them merely as a peer. In the Court of the Lord High Steward held in the recess of Parliament, he is the sole judge of matters of law, and cannot intermix with the peers, or give any vote upon the trial.

*The Queen's Bench.*—The Court of Queen's Bench is divided into a *crown side* and a *plea side*, the latter of which we have already considered. On the crown side, this court is entrusted with the highest jurisdiction, not only over all capital of-

fences, but also all other misdemeanors whatsoever of a public nature, tending either to a breach of the peace or the oppression of the subject. Into this court, also, all indictments from all inferior courts may be removed by writ of *certiorari*, and either tried at bar or at *nisi prius*, by a jury of the county out of which the indictment is brought. This court also hath not only power to reverse erroneous judgments given by inferior courts, but also to punish all inferior magistrates, and all officers of justice, for all wilful and corrupt abuses of their authority against the known, obvious, and common principles of justice; but not for mere mistakes which an honest, well-meaning man may innocently fall into. The judges of this court are the supreme coroners of the kingdom, sovereign justices of oyer and terminer and general gaol delivery, and principal conservators of the peace; and being the principal court of criminal jurisdiction, the coming of the court of Queen's Bench into any county suspends the power of all former commissions of oyer and terminer and general gaol delivery, except where particular provisions are made to prevent this.

*Court of chivalry.*—The court of chivalry was a court of criminal jurisdiction over pleas of life and member arising in matters of deeds of arms and war, as well out of the realm as within it. It is now, however, fallen into entire disuse.

*Admiralty court.*—The high court of Admiralty, held before the lord high admiral of England or his deputy, styled the judge of the admiralty, is a court not only of civil but of criminal jurisdiction also, and hath cognizance of all crimes and offences committed either upon the sea or on the coasts out

of the body or extent of any English county. There have been many statutes passed to regulate trials for offences on the high seas, the effect of which, and particularly of the 4 & 5 Will. 4, c. 36, s. 22, and 7 & 8 Vic. c. 2, is to take the jurisdiction away from the admiralty court and to vest it in the courts of assize, oyer and terminer and gaol delivery, and the central criminal court, of which latter court, indeed, the judge of the admiralty is a judge, but his presence is not absolutely necessary.

*Oyer and terminer and gaol delivery.*—A court of oyer and terminer, that is, to hear and determine, is constituted by the King's commission for this purpose, directed to two of the judges of the superior courts and many others; but as the judges, queen's counsel, or serjeants-at-law only are of the *quorum*, the rest cannot act without at least one of them. By virtue of this commission, they are empowered to "enquire, hear, and determine" all treasons, felonies, and misdemeanors, so that they can only proceed on an indictment found at the same assizes; for they must first enquire, by means of the grand jury or inquest, before they are empowered to hear and determine by the help of the petit jury. But by being also a court of gaol delivery, they are empowered by the commission of gaol delivery to deliver every prisoner who shall be in the gaol (or out on bail) when the judges arrive at the circuit town, whenever indicted, or for whatever crime committed; so that one way or other the gaols are cleared, and all offenders tried, punished, or delivered twice in every year. Sometimes also, upon urgent occasions, the king issues a special or extraordinary commission of oyer and terminer and gaol delivery, confined to those offences which stand in need of immediate enquiry and punishment. The judges may now (though

formerly it was otherwise) exercise the office of justice of oyer and terminer or gaol delivery in any county for which he is appointed, notwithstanding his having been born or inhabiting within such county.

*Central Criminal Court.*—What has just been stated as to courts of oyer and terminer and gaol delivery does not apply to London, Middlesex, and some adjacent parts. But by the 4 & 5 Will. 4, c. 36, a new court was established for the trial of offences in London, Middlesex, and certain suburban parts of Essex, Kent, and Surrey, to be called the Central Criminal Court, the judges whereof shall be the Lord Mayor of London, the Lord Chancellor or Lord Keeper, the judges of the courts at Westminster, the judges in bankruptcy, the judge of the admiralty, the dean of the arches, the aldermen of London, the recorder and common serjeant of London, the judges of the sheriff's court there, any person who has been Lord Chancellor or Lord Keeper, or a judge of any of the courts at Westminster, and such others as the crown shall from time to time appoint. And it is provided (s. 2), that the crown may issue its commission of oyer and terminer and gaol delivery to such court, and that the said judges, or any two or more of them, shall hold a session for London and Middlesex, and the parts of Essex, Kent, and Surrey before mentioned, in the city of London or suburbs thereof, at least twelve times in every year (and oftener if need be), such times to be fixed by general orders of the said court, which any eight or more of the said judges of the courts of Westminster are empowered from time to time to make.

*The sessions.*—The general session of the peace

is a court of record held every quarter of a year or oftener, in every county, before two or more justices, one of them to be of the *quorum*, for the execution of the authority given to them by the commission of the peace, and by several acts of parliament. In some of the counties, the justices divide the shire into three or four parts, and keep four several sessions in each part. By 1 Will. 4, c. 70, s. 35, the quarter sessions are appointed to be kept in the first week after the 11th of October, in the first week after the 28th of December, in the first week after the 31st of March, and in the first week after the 24th of June. The place for keeping the quarter sessions in the county is usually in one of the principal towns in the county, according to the discretion of the justices. The jurisdiction of this court, by 34 Edw. 3, c. 1, extended to the trying and determining all felonies and trespasses whatsoever, though they seldom if ever tried any greater offence than small felonies; their commission providing that, if any case of difficulty arose, they should not proceed to judgment but in the presence of one of the justices of the courts of Queen's Bench or Common Pleas, or one of the judges of assize; and therefore murder and all capital felonies were usually remitted to the assizes. But it is now, by the 5 & 6 Vic. c. 38, provided, that the sessions shall not try any prisoner for murder, or capital felony, or any felony which when committed by a person not previously convicted of felony is punishable with transportation for life: nor for any of the following offences, namely,—1, misprision of treason; 2, offences against the Queen's title, prerogative, or government, or against either house of parliament; 3, offences subject to the penalties of *præmunire*; 4, blasphemy and offences against religion; 5, administering or taking unlawful oaths; 6, per-

jury and subornation of perjury; 7, making or suborning false oaths, &c., punishable as perjuries or misdemeanors; 8, forgery; 9, maliciously firing corn, grain, &c., wood, trees, &c., or heath, gorse, &c.; 10, bigamy and offences against the laws relating to marriage; 11, abduction of women or girls; 12, concealing births; 13, offences against the bankrupt and insolvent laws; 14, seditious, blasphemous, or defamatory libels; 15, bribery; 16, unlawful combinations and conspiracies, with certain exceptions; 17, stealing, &c., records, &c.; 18, stealing, &c., bills, &c., and written documents relating to real estates. The usual matters upon which the sessions adjudicate are the smaller misdemeanors not amounting to felony; and especially offences relating to game, highways, ale-houses, bastards, the settlement and provision for the poor, servants' wages and apprentices. Some of these are proceeded upon by indictment, others in a summary way by motion and order thereupon; and most of the matters just mentioned come on by way of appeal from the justices of the peace. The sessions cannot try any newly-created offence without express power given them by the statute which creates it. An order of the quarter sessions, as well as an indictment there found, may be removed into the Queen's Bench by writ of *certiorari*, and quashed for insufficiency (unless the right to this writ be specially taken away, as it is in some instances by the legislature), and the final determination of the matter left with the court.

As regards the county of Middlesex in particular, it is enacted by the 7 & 8 Vic. c. 71, that there shall be holden for that county two sessions or adjourned sessions of the peace in every calendar month, and that the first sessions in January, April, July, and October respectively shall be the general

quarter sessions of the county; and the second sessions in January, April, July, and October shall be adjournments of the general quarter sessions; and that it shall be lawful for her Majesty to appoint a person, being a serjeant or a barrister at law of not less than ten years' standing, and in the commission of the peace for the county, and qualified by law to act as justice of the peace, to be assistant judge of the said quarter sessions of the peace, who shall preside at the hearing of all appeals, on the trials of all felonies and misdemeanors, and all matters connected therewith, and hold his office during good behaviour. In many municipal corporations or boroughs, there is also a court of quarter sessions of the peace, having in general the same authority in cases arising within the limits of the borough as the county quarter sessions within the county. But of such courts the recorder of the borough is, by 5 & 6 Will. 4, c. 75, s. 105, to be the sole judge; and he is thereby directed to hold such court once in every quarter of a year, or at such other and more frequent times as in his discretion he may think fit, or her Majesty may direct.

We have before (pp. 102, 103) spoken of the special and petty sessions, and we now proceed to notice the few remaining courts of criminal jurisdiction. They are the following; namely, the sheriff's tourn, or rotation, which is a court of record, and held twice every year; the court leet, or view of frankpledge, which is a court of record, held once a year within a particular hundred, lordship, or manor, before the steward of the leet; the court of the clerk of the market, which is incident to every fair and market in the kingdom. These are of little or no importance; but there is another jurisdiction, which we have before (pp. 100, 101) noticed, namely, the coroner's court, which is of



great practical utility. There are also some courts of special jurisdiction; namely,—1. The court of the lord steward of the Queen's household, or of the treasurer, comptroller and steward of the marshalsea, which hath cognisance of offences committed within the limits of any of the palaces and houses of the sovereign. 2. The university courts. These are fallen into desuetude.

## A D D E N D A.

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P. 70. *Game Certificates.—Killing hares.*—In reading of game certificates and the killing of hares, it must be borne in mind that the 11 & 12 Vic. c. 29, enables persons having a right to kill hares in England and Wales, to do so, by themselves or persons authorised by them, without taking out a game certificate. By sect. 1, any person being in the actual occupation of any inclosed lands, or any owner thereof, who has the right of killing game thereon, by himself or by any person directed or authorised by him in writing, according to the form in the schedule to the act annexed, or to the like effect, so to do, may take, kill, or destroy any hare then being in or upon any such enclosed lands, without the payment of any duties of assessed taxes, and without the obtaining of an annual game certificate. By sect. 2, the authority to kill hares is to be limited to one person at the same time in any one parish, which authority is to be sent to the clerk of the peace, who is to register same. Notice of revocation of the authority must be given. By sect. 3, persons killing hares under the act are not, there-

fore, liable to the tax on gamekeepers. By s. 4, any person may pursue and kill or join in the pursuit and killing of any hare by coursing with greyhounds, or by hunting with beagles or other hounds, without having obtained an annual game certificate. By sect. 6, the act is not to extend to the case of an agreement not to take, kill, or destroy game.

P. 103. *Protection of justices of the peace.*]—At p. 103, it has been mentioned that justices of the peace are protected by many statutes, and it may now be added that the 11 & 12 Vict. c. 44 (operating from the 2nd of October, 1848), repeals many provisions and re-enacts same with additions. As this is a very important statute, we shall state its chief provisions. By sect. 1, for an act by a justice of peace within his jurisdiction the action shall be on the case, and it shall be alleged to have been done maliciously, and without probable cause, and be so proved. By sect. 2, for an act done by him without jurisdiction, or exceeding his jurisdiction, an action may be maintained without such allegation; but not for an act done under a conviction or order, until after such conviction or order shall have been quashed; nor for an act done under a warrant to compel appearance, if a summons were previously served and not obeyed. By sect. 3, if one justice make a conviction or order, and another grant a warrant upon it, the action must be brought against the former, not the latter, for a defect in the conviction or order. By sect. 4, no action shall be brought for issuing a distress warrant for poor's rate by reason of any defect or that the party is not rateable. Nor shall an action be brought against justices for the manner in which they exercise a discretionary power. By sect. 5, if a justice refuse to do an act, the Court of Queen's Bench may by rule

order him to do it, and no action shall be brought against him for doing the act thereby required to be done. By sect. 6, after conviction or order confirmed on appeal, no action is to be brought for anything done under a warrant upon it. By sect. 7, if an action be brought where by this act it is prohibited, a judge may set aside the proceedings. By sect. 8, an action against a justice must be brought within six calendar months next after the committing the act complained of. By sect. 9, one calendar month's notice of action must be given to the justice. By sect. 10, the venue is to be laid in the county or district where the act complained of was committed, and the defendant may plead the general issue, and give any special matter, &c., in evidence. No proceedings are to be had in the county court if the justice objects thereto. By sect. 11, the justice may tender amends and pay money into court. By sect. 12, if the plaintiff were really guilty, he shall not recover the penalty he paid, nor more than twopence damages for any imprisonment.

P. 108. *Removal of the poor.*—At p. 108 it is stated that a copy of the examinations must be sent with the notice of an order of removal, but this has been altered by the 11 & 12 Vict. c. 31. It is also there said that an appeal may be entered after actual removal, though the time for appealing after notice of chargeability had elapsed. Sect. 9 of the same statute has altered this doctrine. As the act is of importance, we will state some of its provisions. Sect. 1 repeals so much of the 4 & 5 Will. 4, c. 76, as requires that the notice of chargeability shall be accompanied by a copy of the examinations upon which the order of removal was made. By sect. 2, instead thereof, such notice shall be accompanied by a statement in writing under the hands of such overseers or such guardians, or any three or more of such

guardians, setting forth the grounds of such removal, including the particulars of the settlement relied upon. On the hearing of any appeal the respondents are not to give evidence of any other grounds of removal than those set forth in such statement. By sect. 3, copies of the depositions are to be furnished by the clerk to the justices on application and payment of twopence per folio. By sect. 4, upon the hearing of any appeal against an order of removal, no objection whatever on account of any defect in the form of setting forth any ground of removal or of appeal in any such statement shall be allowed, and no objection to the reception of legal evidence offered in support of a ground of removal or appeal alleged to be set forth in any such statement shall prevail, unless the court shall be of opinion that such alleged ground is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement, and to prepare for trial; and then the same may, on terms, be amended. By sect. 5, parties making frivolous or vexatious statement of grounds of removal or appeal may be ordered to pay the costs occasioned thereby. By sect. 6, power is given to the court to amend the order of removal on account of any omission or mistake in drawing it up. By sect. 7, the decision of the court upon the hearing of any appeal against any order of removal, as well as upon the sufficiency and effect of the statement of the grounds of removal and of appeal, and of the notice of chargeability, and of the copy or counterpart of the order of removal sent to the appellant parish, as upon the amending or refusing to amend the order of removal, or the statement of grounds of removal or appeal, shall be final, and shall not be liable to be reviewed in any court, by means of a writ of certiorari, or mandamus, or otherwise.

By sect. 8, orders of removal may be abandoned by notice in writing. Costs are to be paid. By sect. 9, no appeal shall be allowed against any order of removal if notice of such appeal be not given as required by law, within the space of twenty-one days after the notice of chargeability and statement of the grounds of removal shall have been sent by the overseers or guardians of the removing parish to the overseers or guardians of the parish to which such order shall be directed, unless within such period of twenty-one days a copy of the depositions shall have been applied for as aforesaid by the last mentioned overseers or guardians, in which case a further period of fourteen days after the sending of such copy shall be allowed for the giving of such notice of appeal, but in such case no poor person shall be removed under such order of removal until the expiration of such further period of fourteen days.

P. 341. *Accessaries.*]—At p. 341, and elsewhere where accessaries are spoken of, the reader must bear in mind the late act, 11 & 12 Vic. c. 46, by sect. 1 of which accessaries before the fact to any felony may be indicted, tried, convicted, and punished in the same manner as if they were principals. By sect. 2, if any person shall become an accessary after the fact to any felony he may be indicted and convicted either as an accessary after the fact to the principal felony together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessary after the fact to the same felony if convicted as an accessary may be punished, and the offence of such person, howsoever indicted,

may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon in the same manner as if the act by reason of which such person shall have become an accessory had been committed at the same place as the principal felony: Provided always, that no person who shall be once duly tried for any such offence, whether as an accessory after the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offence.

## TRANSLATION OF LATIN PHRASES.



- P. 4.—*Ore tenuis*. By word of mouth.
- P. 6.—*Cuilibet in sua arte credendum est*. Credence should be given to one skilled in his peculiar profession.
- P. 6.—*Jus accrescendi inter mercatores pro beneficio commercii locum non habet*. The right of survivorship has no place among trading partners.
- P. 6.—*Malus usus abolendus est*. A vicious or invalid custom should be abolished.
- P. 7.—*Continuo dico, ita quod non sit legitime interrupta*. I say continuous, so that it be not lawfully interrupted.
- P. 8.—*Id certum est quod certum reddi potest*. That is sufficiently certain which can be rendered certain.
- P. 14.—*Caput, principium, et finis*. Head, beginning, and end.
- P. 24.—*In perpetuum rei testimonium*. In perpetual testimony of the matter.
- P. 26.—*In pari materia*. Relating to the same subject matter.
- P. 27.—*Divisum imperium*. Divided power or government.
- P. 29.—*Jura regalia*. Regal rights.



- P. 29.—*Regalem potestatem in omnibus.* Regal rights over all matters.
- P. 38.—*En ventre de sa mere.* In the womb.
- P. 40.—*Prochein ami.*—Next friend.
- P. 41.—*De prerogativa regis.*—Concerning the king's prerogative.
- P. 41.—*Non compos mentis.* Not of sound mind.
- P. 42.—*De idiotâ inquirendo.* For inquiring as to idiocy.
- P. 42.—*De lunatico inquirendo.* For inquiring as to lunacy.
- P. 46.—*Ne exeat regno.*—That he should not go out of the kingdom.
- P. 50.—*Hæres natus.* The heir by birth.
- P. 50.—*Hæres factus.* The heir by terms of the gift.
- P. 53.—*Commune concilium regni Angliæ.* The common council of the kingdom of England.
- P. 57.—*Nullum tempus occurrit regi.*—Lapse of time does not bar the right of the crown.
- P. 61.—*Dernier ressort.* The last resort.
- P. 66.—*Feræ naturæ.*—Of a wild nature.
- P. 77.—*Ex donatione regis.* From the gift of the king.
- Pp. 83 & 84.—*Vicem seu personam ecclesiæ gerere.* To represent the church.
- P. 97.—*Custodiam comitatus.* The keeping of the county.
- P. 100.—*De coronatore eligendo.* Concerning the election of a coroner.
- P. 101.—*De coronatore exonerando.* For the exonerating of a coroner.
- P. 101.—*Quorum aliquem vestrum et unum esse volumus.* Of whom we desire that any of you, A. B. and C. D. be one.
- P. 101.—*Dedimus potestatem.* We have empowered.

- P. 117.—*Nam qui facit per alium, facit per se.* For he who does any act by another, is held to act by himself.
- P. 118.—*Consensus, non concubitus, facit nuptias.* Consent not cohabitation, makes a marriage.
- P. 121.—*A vinculo matrimonii.* From the bond of matrimony.
- P. 121.—*Pro salute animarum.* For the health of their souls.
- P. 121.—*A mensâ et thoro.* From bed and board.
- P. 124.—*Pater est quem nuptiæ demonstrant.* He is the father of the child whom the marriage shows to be so.
- P. 126.—*Extra quatuor maria.* Beyond the four seas.
- P. 127.—*Nullius filius.*—The son of no one in particular.
- P. 131.—*Cujus est solum ejus est usque ad cælum.* He who possesses land, possesses also that which is above it.
- P. 132.—*Liberum tenementum.* A frank or free tenement.
- P. 136.—*Nemo est hæres viventis.* No one can be heir during the life of his ancestor.
- P. 146.—*Durante viduitate.* During widowhood.
- P. 150.—*Id certum est quod certum reddi potest.* That is sufficiently certain which can be made certain.
- P. 158.—*Ecclesia decimas non solvit ecclesiæ.* The church does not pay tithes to the church.
- P. 158.—*Modus de non decimando non valet.* In lay hands a total discharge from tithes is not available.
- P. 168.—*Vivum vadium.* Living pledge.
- P. 168.—*Mortuum vadium.* Dead pledge.
- P. 172.—*Potentia propinqua.* Common or near possibility.
- P. 179.—*De partitione faciendâ.* For the making of a partition.
- P. 180.—*Juris et seisinæ conjunctio.* The conjunction in the same person of the right and the seisin.

- P. 184.—*Hæreditas nunquam ascendit.* The inheritance never ascends.
- P. 185.—*Jure representationis.* By right of representation.
- P. 187.—*Propter defectum sanguinis.* For want of heirs.
- P. 187.—*Propter defectum tenentis.* On account of the crime of the tenant.
- P. 188.—*Ultimus hæres.* Ultimate heir.
- P. 190.—*In mortua manu.* In a dead hand.
- P. 192.—*Pro hac vice.* For this turn.
- P. 194.—*Habendum et tenendum.* To have and to hold.
- P. 196.—*Donatio feudi.* Gift of a feud.
- P. 214.—*Habere facias seisinam.* That you cause him to have seisin.
- P. 216.—*Es provisione viri.* By provision of her husband.
- P. 222.—*Animo revocandi*—With the intention of revoking.
- P. 236.—*In autre droit.* In the right of another person.
- P. 238.—*Ex nudo pacto non oritur actio.* From a mere agreement, without consideration, no action arises.
- P. 258.—*Cum testamento annexo.* With the will annexed.
- P. 258.—*Durante minore ætate.* During minority.
- P. 270.—*Vi et armis.* With force and arms.
- P. 270.—*De bonis asportatis.* Of the goods carried away.
- P. 276.—*Casualiter et per infortunium contra voluntatem suam.* Casually and by accident, against his will.
- P. 276.—*Manus molliter imposuit.* Gently laid hands on him.
- P. 277.—*Devastavit.* Destruction or waste.
- P. 280.—*Fidem adhibens.* Believing, relying.
- P. 282.—*Replegiari facias.* That you cause to be re-delivered.

- P. 282.—*Plegios de retorno habendo*. Pledges for having a return.
- P. 283.—*De proprietate probandd*. For proving the property.
- P. 283.—*Capias in withernam*, or, *in vetito namio*. That you take other goods, &c.
- P. 286.—*Ab initio*. From the beginning.
- P. 290.—*Unde nihil habet*. Because she has had nothing.
- P. 290.—*Quare impedit*. Wherefore he is hindered.
- P. 290.—*Mort d'ancestor*. Death of his ancestor.
- P. 291.—*Ne unques accouple in loial matrimonie*.—Never lawfully married.
- P. 301.—*Non est inventus*. Is not found.
- P. 301.—*Exigi facias*.—That you cause to be exacted.
- P. 301.—*Allocatur exigent*.—Another exigent allowing the previous exactions.
- P. 301.—*Novel disseisin*. Recent disseisin.
- P. 307.—*Quare clausum fregit*. Wherefore he broke his close.
- P. 312.—*Tales de circumstantibus*. Such of the bystanders.
- P. 314.—*Non obstante veredicto*.—Notwithstanding the verdict.
- P. 315.—*Cognovit actionem*. He acknowledged the action.
- P. 316.—*Respondeas ouster*. That you answer or plead over.
- P. 317.—*De clerico admittendo*. For admitting a clerk.
- P. 317.—*De retorno habendo*.—For having a return.
- P. 317.—*Capias ad satisfaciendum*. That you take to satisfy.
- P. 339.—*Malitia supplet etatem*. Malice supplies the want of age.
- P. 339.—*Ex presumptione juris*. By presumption of law.

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- P. 342.—*De hæretico comburendo*. For the burning of a heretic.
- P. 349.—*In consortium imperii*. A companion in the government.
- P. 361.—*Posse comitatûs*. The power of the county.
- P. 363.—*Particeps criminis*. Companion in crime.
- P. 394.—*Animo furandi*. With the intention of stealing.
- P. 434.—*Propter honorem respectum, propter defectum, propter affectum, propter delictum*. On account of honour or dignity, on account of incompetency, on account of partiality, on account of crime.
- P. 453.—*Communia placita non sequantur curiam nostram sed teneantur in aliquo certo loco*. Let not the Common Pleas follow our court, but be held in some certain place.

## NOTES AND REFERENCES.

## CHAP. I.—P. 1—11.

- (a) See Kelly's Answ. Exam. Quest. Hil. T. 1848, p. 8.
- (b) See the case of *Ramoll Thackoorseydass v. Soojumnul Dhondmull*, in the House of Lords, reported in 12 Jurist, 315.
- (c) For a general estimate of the reports and text books, see 1 Bl. Com. 71—73; 1 Steph. Com. 49—52. For more particular information, and for a list of the works, see vols. 4, 5, and 6, Law Stud. Mag. in index, title "*Law Writers and Books.*"
- (d) See Litt. Ten. ss. 633, 635, and notes.
- (e) See further, Litt. ss. 210, 265, and notes thereto.
- (f) See Litt. Ten. ss. 165, 210, and notes thereto.
- (g) See Litt. Ten. ss. 37, 166.
- (h) 1 Steph. Com. 54.
- (i) *Bruin v. Knott*, 9 Jurist, 979.
- (k) See 1 Black. Com. 75.
- (l) See 2 Bacon's Abr. tit. "Customs of London." For maxim, see 6 Law Stud. Mag. 275, 276.
- (m) See Litt. Ten. ss. 281, 282, and notes thereto.
- (n) Bacon's Abr. tit. "Merchant."
- (o) Broom's Max. 715, 2d edit.
- (p) See Litt. Ten. s. 170; 12 Jur. 267.
- (q) 1 Black. Com. 77.
- (r) See Litt. Ten. s. 209.
- (s) 1 Black. Com. 78.

- (t) 1 Black. Com. 78.
- (v) Reported, *Strange*, 1060; 2 Atk. 659, 669.
- (w) 1 Black. Com. 83.

## CHAP. II.—P. 12—26.

- (a) 1 Black. Com. 160.
- (b) See 3 Hallam's *Middle Ages*, p. 40.
- (c) 2 Jurist, 460.
- (d) 2 Steph. Com. 363.
- (e) 1 Black. Com. 181.
- (f) Some other functionaries are declared incompetent. 2 Steph. Com. 391.
- (g) 7 & 8 Will. 3, c. 25, s. 7; 2 Will. 4, c. 45, ss. 18, 19, 20, 23.
- (h) 2 Will. 4, c. 45, s. 18.
- (i) See 2 Will. 4, c. 45, ss. 18, 19, 20.
- (j) 11 Jurist, 22; 2 Com. B. Rep. 97.
- (k) *Ibid.*; 10 Jurist, 1089.
- (l) 2 Steph. Com. 381.
- (m) 2 Com. B. Rep. 31.
- (n) 1 Black. Com. 165; Re *Duncombe*, MSS.
- (o) *Cassidy v. Stewart*, 9 Dowl. 366; *Pract. Com. Law*, 320.
- (p) *Selw. N. P.* 226, 11th edit.
- (q) See p. 58.
- (r) 1 Black. Com. 186.
- (s) *Broom's Max.* 28, 35.
- (t) *Richards v. Easto*, 15 Mees. & W. 244; S. C. 15 Law Journ. N. S. Ex. 163; 10 Jur. 695.
- (u) *Dawson v. Paver*, 5 Hare, 415; S. C. 11 Jur. 766; 16 Law Journ. N. S. ch. 274.
- (v) 1 Steph. Com. 68; 12 Mees. & W. 236.
- (w) See p. 22.
- (x) *The Sussex Peerage Case*, 11 Cl. & Fin. H. L. C. 86; 1 Black. Com. 87, 88; 1 Steph. Com. 73; *Broom's Max.* 59, 2d edit.
- (y) *Bacon's Abr.* tit. "Statute" G.
- (z) *Salk.* 609; 5 Jur. 963.
- (aa) *Broom's Max.* 438.
- (ab) See *Smith v. Bell*, 2 Railway Cas. 877; S. C. 10 Mees. & W. 378.
- (ac) See *Broom's Max.* 15—18; 1 Fonbl. Eq. 18.

## CHAP. III.—P. 27—36.

- (a) 10 & 11 Vic. c. 108.
- (b) 2 Steph. Com. 59.
- (c) Certain parts of one county are sometimes situate in another. Pract. Com. L. 106.
- (d) 1 Steph. Com. 120.
- (e) See p. 103, 104.
- (f) Christian's Note to 1 Bl. Com. 114.
- (h) 1 Steph. Com. 115.
- (i) 1 Black. Com. 93.
- (j) 2 & 3 Will. 4, c. 65, s. 1.
- (k) 1 Steph. Com. 85.
- (l) 1 Archb. Pract. 285, 539; 3 Bing. 461; 5 Com. Dig. tit. "Scotland," B.
- (m) 39 & 40 Geo. 3, c. 67.
- (n) 7 Barn. & Cres. 388; Pract. Com. Law, 97.
- (o) 1 Steph. Com. 95.
- (p) Re Wilson, 9 Jur. 393, 394.
- (q) 1 Steph. Com. 100.

## CHAP. IV.—P. 37—47.

- (a) See Co. Litt. 123, 129a, n. 2 & 244a; 2 Steph. Com. 317.
- (b) See 1 Daniel's Ch. Pract. 73, 2d edit.
- (c) See 1 Daniel's Ch. Pract. 73, 2d edit.
- (d) See Allen v. Allen, 2 Dru. & W. 307; S. C. 1 Con. & L. 427 (Irish Courts); 1 Shepp. Touchst. 288, n. (u), by Atherley; 1 Prest. Abstr. 324, 325.
- (e) 1 P. Will. 559; Abr. Eq. 282; 4 Bacon's Abr. 356, 377.
- (f) 2 Chitt. Archb. Pract. 1094, 8th edit.
- (g) 8 Coke's Rep. 43.
- (h) Flight v. Bolland, 4 Russell, 298.
- (i) Princ. Com. Law, 205—208.
- (j) Princ. Com. L. 41, 342.
- (l) See 8 & 9 Vic. c. 100; 9 & 10 Vic. c. 126; 10 & 11 Vic. c. 43.
- (m) See Princ. Com. Law, 42, 342.
- (n) 3 Steph. Com. 701.
- (o) Wright v. Wilson, 1 Lord Raym. 739.
- (p) Bird v. Jones, 7 Q. B. Rep. 742; S. C. 9 Jur. 870.



- (g) See *Princ. Com. Law*, 168—171.
- (r) 3 *Law Stud. Mag.* 99—105.
- (s) See *Princ. Com. Law*, pp. 40, 41.
- (t) *Post*, p. 410.

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CHAP. V.—P. 47—61.

- (a) 2 *Steph. Com.* 440.
- (b) *Sussex Peerage*, 11 *Cl. and Fin.* 85.
- (c) See *Co. Litt.* 110a, n. 5.
- (d) 2 *Steph. Com.* 482.
- (e) See *Parsee Murder Case*, exp. *Eduljee Byramjee*, 11 *Jur.* 855.
- (f) See 1 *Bl. Com.* 236; 2 *Steph. Com.* 417—420.
- (g) *Broom's Max.* 43, 44; *post*, 293.
- (h) 2 *Steph. Com.* 501.
- (i) See *Browell's Stats.* 21.
- (j) *Mayor, &c., of Exeter v. Warren*, 8 *Jur.* 443.
- (k) See 3 & 4 *Will.* 4, c. 42, ss. 58, 104.
- (l) *Post*, 446.
- (m) *Post*, 111.
- (n) See *post*, 189; *Litt.* s. 183.
- (o) 2 & 3 *Will.* 4, c. 92; 3 & 4 *Will.* 4, c. 41.

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CHAP. VI.—P. 62—71.

- (a) 2 *Steph. Com.* 545.
- (b) 2 *Inst.* 647; 9 *Jur.* 535.
- (c) See 4 & 5 *Vict.* c. 39, s. 4.
- (d) See 1 & 2 *Vict.* c. 96, s. 4.
- (e) 1 *Black. Com.* 289.
- (f) See 6 *Bac. Abr.* 402, 7th edit.
- (g) 5 *Co. Rep.* 108; 9 *Jur.* 286.
- (h) See 1 & 2 *Vict.* c. 120; 2 & 3 *Vict.* c. 58, s. 1.
- (i) 3 *Inst.* 132.
- (j) *Finch's Law*, 212.
- (k) 1 *Black. Com.* 298.
- (l) See *post*, p. 187.

- (m) 1 Fonbl. Eq. 56, 57.
  - (n) 1 Bl. Com. 309.
  - (o) 1 Steph. Com. 575.
  - (p) 1 Bl. Com. 318.
  - (q) 1 Steph. Com. 582.
  - (r) The last act is the 11 & 12 Vic., to assimilate the stamp duties.
  - (s) The certificate on hares is now taken away, see *post*, pp. 475, 476.
  - (t) The act is the 11 & 12 Vict. c. —, which continues the tax until the 5th of April, 1851.
  - (u) 2 Steph. Com. 591.
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## CHAP. VII.—P. 72—79.

- (a) Indemnity acts are passed annually to relieve those who have omitted to take the necessary oaths.
  - (b) 1 Bl. Com. 370, n. (1) by Chris.
  - (c) 11 & 12 Vict. c. 20.
  - (d) Co. Litt. 8a, n. 2.
  - (e) 1 Bl. Com. 373, n. (7) by Chr.; Co. Litt. 8a, n. (1), 129a, n. (2).
  - (f) See 6 Law Stud. Mag. 301; Princ. Com. Law, 32, 38.
  - (g) *Pisani v. Lawson*, 8 Dowl. 57.
  - (h) See 1 Law Stud. Mag. 128; 5 *Id.* 137; Princ. Com. Law, 32, 33, 38, 39.
  - (i) See Princ. Com. Law, 39, 40.
  - (j) See Princ. Com. Law, 39, 40.
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## CHAP. VIII.—P. 80—89.

- (a) Pract. Com. Law, 105.
- (b) Princ. Com. Law, 346, 347.
- (c) 1 Bl. Com. 379, 380.
- (d) 3 Steph. Com. 68.
- (e) 1 Bl. Com. 383.
- (f) Litt. ss. 653—658, and notes.
- (g) 1 Bl. Com. 385, *et seq.*

- (h) 1 Steph. Com. 76.
- (i) 1 Bl. Com. 390.
- (j) 1 Bl. Com. 393.
- (k) 3 Steph. Com. 88, 89.
- (l) 3 Steph. Com. 85; 9 Jur. 497.
- (n) 3 Steph. Com. 86.
- (o) See Princ. Com. Law, 22, 23; 6 Law Stud. Mag. 96—98.
- (p) 3 Steph. Com. 90.
- (q) Worth v. Terrington, 13 Mees. and W. 781.
- (s) See Reg. v. Smith, 8 Jur. 599; S. C. 13 Law Journ., N. S., Q. B. 166.

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CHAP. IX.—P. 90—91.

- (a) 1 Bl. Com. 400; Ritso, 98.
- (b) Pract. Com. Law, 97.
- (c) Earl of Waterford's Claim, 6 Cl. and Fin. 133.
- (d) 2 Inst. 667.

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CHAP. X.—P. 95, 96.

- (a) 1 Bl. Com. 412.
- (b) 1 Bl. Com. 414, 415.
- (c) 2 Steph. Com. 604.
- (d) See 22 Geo. 2, c. 33; 19 Geo. 3, c. 17.
- (e) See Pract. Com. Law, 104, 105.
- (f) 1 Will. 4, c. 20; 7 Will. 4, and 1 Vict. c. 26, ss. 11, 12; 2 Law Stud. Mag. 320.

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CHAP. XI.—P. 97—108.

- (a) 3 & 4 Will. 4, c. 99.
- (b) In fact, the whole of the jurisdiction of the old county court is transferred to the new courts, so far as those new courts have jurisdiction. See *post*, p. 449.

- (c) Pract. Com. Law, 181—183.
- (d) Pract. Com. Law, 338.
- (e) See Pract. Com. Law, 4, *et seq.*
- (f) 2 Law Stud. Mag. 545, 546.
- (g) Pract. Com. Law, 115, 331, 443.
- (h) Margate Pier Company v. Hannam, 3 Barn. and Ald. 266.
- (i) See the provisions of the late act set out *post*, p. 476.
- (j) Bacon's Abr, tit. "Justices of the Peace," F.
- (k) 11 Jur. 713.
- (l) 5 Law Stud. Mag. 51, 52.
- (m) 8 Q. B. Rep. 13; 12 Jur. 498.
- (n) See the late act, 11 & 12 Vict. c. —, for charging the expenses on the unions.
- (o) 16 Law Journ., N.S., M.C. 25.
- (p) See 5 Law Stud. Mag. 168. See *post*, p. 477, as to appeal after removal.

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CHAP. XII.—P. 109—114.

- (a) Daniel's Chanc. Pract. 22, 23.
- (b) See Princ. Com. Law, 181, 248; 10 Jur. 755; 3 Q. B. Rep. 223. As to *bye laws*, see 6 Law Stud. Mag. 267.
- (c) See *post*, p. 221; 6 Law Stud. Mag. 17.
- (d) 3 Steph. Com. 184.
- (e) 11 Jur. 681.
- (f) See p. 293.
- (g) 16 Law Journ., N. S., Q. B. 333.
- (h) See Ridley v. Plymouth Grinding Company, 12 Jur. 542, stated 6 Law Stud. Mag. 377.

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CHAP. XIII.—P. 115—117.

- (a) Selw. N. P. 1102, 11th edit.; 5 Jur. 870.
- (b) 9 Barn. and Cres. 628.
- (c) 2 Steph. Com. 272; 12 Jur. 95.
- (d) See Princ. Com. Law, 69—72.
- (e) Ritso, p. 62.

- (f) *Princ. Com. Law*, 226.
- (g) *Selw. N. P.* 1104, 1105.
- (h) *Princ. Com. Law*, 200.

## CHAP. XIV.—P. 118—123.

- (a) *Broom's Max.* 379, 380, 388.
- (b) 2 *Steph. Com.* 285; 6 *Law Stud. Mag.*, 53, 54.
- (b\*) 5 *Law Stud. Mag.* 207, 208; 6 *Id.* 53.
- (c) *Litt.* p. 56; *Princ. Equity*, No. 37; 6 *Law Stud. Mag.* 53.
- (d) 2 *Steph. Com.* 249, *et seq.*
- (e) See 5 *Law Stud. Mag.* 123.
- (f) 11 *Sim.* 361; 5 *Jur.* 166.
- (g) 2 *Steph.* 313.
- (h) 2 *Black. Com.* 440.
- (i) See *Lucas v. Lucas*, 1 *Atk.* 271; also 3 *P. Will.* 334.
- (j) 1 *Daniel's Ch. Pr.* 94; 4 *Law Stud. Mag.* 166—169.
- (k) *Fonbl. Equity*, 94.
- (l) 2 *Steph. Com.* 303.
- (m) *Princ. Com. Law*, 72.
- (n) See *post*, 217, 218; *Litt. s.* 570, and note.
- (o) *Comyn's Dig.* tit. "Devise," H. 3; 2 *Jur.* 266; 2 *Law Stud. Mag.* 557; 9 *Jur.* 417.

## CHAP. XV.—P. 124—127.

- (a) 2 *Steph. Com.* 321; 6 *Law Stud. Mag.* 221.
- (b) See p. 129; *Litt.* p. 60.
- (c) *Co. Litt.* 244a. n. (2); 6 *Law Stud. Mag.* 221.
- (d) 1 *Salkeld*, 123.
- (e) 2 *Law Stud. Mag.* 56, 161; 3 *Id.* 71; 5 *Id.* 83, 84.
- (f) 1 *Law Stud. Mag.* 161, 307, 308.
- (g) 1 *You. and Coll. N. C.* 4; *Litt. ss.* 188, 399, 400; 6 *Law Stud. Mag.* 221, 222.
- (h) 11 *East*, 1; 6 & 7 *Will.* 4, c. 85, s. 12.

## CHAP. XVI.—P. 128—130.

- (a) 2 Fonbl. Eq. 236.
  - (b) Co. Litt. 88, note.
  - (c) Litt. s. 123, and note.
  - (d) Co. Litt. 88, note.
  - (e) 2 Fonbl. Equity. 228, 235.
  - (f) 2 Steph. Com. 342.
  - (g) Pract. Com. Law, 78—81; 2 Law Stud. Mag. 247;  
4 *Id.* 169—172.
  - (h) Litt. s. 125, and note.
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## CHAP. XVII.—P. 131—134.

- (a) See illustrations of this maxim, 6 Law Stud. Mag. 277, 278.
  - (b) See as to lands, tenements, and hereditaments, 1 Law Stud. Mag. 311—313; 6 *Id.* 257—261.
  - (c) *Ibid.*
  - (d) Litt. s. 133—142, and the notes.
  - (d\*) Litt. s. 159—161, and notes.
  - (e) See p. 224—227.
  - (f) See Litt. note to sect. 59.
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## CHAP. XVIII.—P. 135—139.

- (a) Broom's Max. 393—396.
  - (b) Litt. ss. 644—647, and notes.
  - (c) Litt. s. 1, note.
  - (d) 4 Law Stud. Mag. 241—245.
  - (e) Litt. s. 13.
  - (f) Litt. s. 13—31, and notes.
  - (g) Pract. Com. Law, 282.
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## CHAP. XIX.—P. 140—148.

- (a) Litt. ss. 68, 69, and notes.
- (b) Princ. Com. Law, 328; Litt. s. 223, and note; Princ. Equity, 114—116.
- (c) Selw. N. P. 1304, 11th edit.; Litt. s. 34, and note.
- (d) Litt. ss. 64, 65, and notes.
- (e) Notes to sects. 35 and 52 of Litt. Tenures.
- (f) Co. Litt. 30a, n. (1).
- (g) Litt. s. 36, and note.
- (h) 5 Law Stud. Mag. 299.
- (i) Litt. s. 37.
- (j) 5 Law Stud. Mag. 299.
- (k) Litt. s. 55, and note.
- (l) See *ante*, p. 76; 5 Law Stud. Mag. 301.
- (m) 5 Law Stud. Mag. 300; 6 *Id.* 93, 94.
- (n) See p. 145.
- (o) 5 Law Stud. Mag. 300.
- (p) Co. Litt. 39; 6 Law Stud. Mag. 163, 164.
- (q) 4 Law Stud. Mag. 116—119; 6 *Id.* 163.
- (r) 4 Brown's Chanc. Cas. 500; Watkins' Convey. by White, 92, 93.

## CHAP. XX.—P. 149—153.

- (a) Litt. Ten. s. 67, and note.
- (b) 2 Black. Com. 144.
- (c) 2 Bl. Com. 145; Litt. s. 68.
- (d) Litt. Ten. s. 68, and note.
- (e) Litt. s. 68, and note.
- (f) Note to sect. 68 of Litt. Ten.; 2 Law Stud. Mag. 178, 287, 419; 5 *Id.* 47, 48.
- (g) 6 Law Stud. Mag. 10, 190; Litt. s. 461, and note; 11 Jur. 286.
- (h) 5 Law Stud. Mag. 97, 98; Princ. Com. Law, 23, 24, 158.

## CHAP. XXI.—P. 154—166.

- (a) Comyn's Dig. tit. "Esglise" H. 3.
- (b) 4 Law Stud. Mag. 18, 86
- (c) Princ. Com. Law, 310.
- (d) Princ. Com. Law, 307, 308; 3 Law Stud. Mag. 139—144, 188—193, 281—287.
- (e) 3 Law Stud. Mag. 139—144
- (f) 4 Law Stud. Mag. 218; 6 *Id.* 155, 156.
- (g) 3 Steph. Com. 135.
- (h) 2 Law Stud. Mag. 465—469.
- (i) 2 Black. Com. 34.
- (j) 5 Law Stud. Mag. 141.
- (k) 2 Black. Com. 35.
- (l) 3 Steph. Com. 1.
- (m) Bacon's Abr. tit. "Sheriff" N.
- (n) *Holford v. Bailey*, 7 Q. B. Rep. 339; S. C. 10 Jur. 822.
- (o) See p. 61.
- (p) See pp. 61, 65, 66.
- (q) See p. 63.
- (r) 5 Jur. 649; 3 Beav. 450.
- (s) Com. Dig. tit. "Rent," C. 2.
- (t) Litt. Ten. p. 84—86.

## CHAP. XXII.—P. 167—170.

- (a) Litt. s. 325.
- (b) Litt. s. 332.
- (c) Note to sect. 334 of Litt. Tenures; Princ. Eq. 297.
- (d) Princ. Com. Law, 272, 288; Princ. Eq. 295; 5 Law Stud. Mag. 17.
- (e) Princ. Eq. 295, *et seq.*; 5 Law Stud. Mag. 18.
- (f) 4 Law Stud. Mag. 302, 303.
- (g) Princ. Com. Law, 27.
- (h) 6 Law Stud. Mag. 174, 244.
- (i) Pract. Com. Law, 282, 311, 312.
- (k) Princ. Equity, 303.



## CHAP. XXIII.—P. 171—175.

- (a) 2 Jurist, 357.
  - (b) Princ. Equity, 287.
  - (c) 2 Bl. Com. 169, 270.
  - (d) Co. Litt. 342b, n. (1).
  - (e) 2 Fonbl. Eq. 87, 89; 2 Bl. Com. 172.
  - (f) *Ibid.* As to the limits of an executory devise, see 2 Law Stud. Mag. 144, 508; 3 *Id.* 230—233.
  - (g) 2 Bl. Com. 176.
  - (h) Litt. s. 10; 1 Steph. Com. 300.
  - (i) 2 Law Stud. Mag. 115, 171; 2 Co. Rep. 61a; 2 Steph. Com. 293.
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## CHAP. XXIV.—P. 176—179.

- (a) Litt. s. 288.
  - (b) Princ. Eq. 163, *et seq.*; Litt. s. 247, note.
  - (c) Litt. ss. 300, 302.
  - (d) 2 Bl. Com. 193, and n. by Chr.
  - (e) 2 Bl. Com. 194.
  - (f) Litt. s. 241, *et seq.*
  - (g) Litt. s. 247, note.
  - (h) Litt. s. 309; 2 Bl. Com. 191.
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## CHAP. XXV.—P. 180—192.

- (a) See 2 Bl. Com. 241—243.
- (b) 5 Law. Stud. Mag. 303; 6 *Id.* 25—28.
- (c) 2 Law Review, 461, 464; 2 Bl. Com. 204, 206.
- (d) 2 Bl. Com. 208, *et seq.*
- (e) Litt. s. 3, and note.
- (f) Hale's Com. Law, 262.
- (g) Litt. s. 5; Hale's Com. Law, 221.
- (h) Hale's Com. Law, 265.
- (i) Litt. s. 2, and note.
- (j) Litt. s. 6, and note.

- (k) *Ibid*; *post*, p. 187.
- (l) 2 Bl. Com. 238; Litt. p. 4.
- (m) Litt. pp. 5, 7 4 Law Stud. Mag. 317, 318.
- (n) See p. 188.
- (o) Co. Litt. 13a, 92b.
- (p) See p. 187.
- (q) Note s. 747 of Litt. Tenures.
- (r) See Princ. Eq. 371, *et seq.*
- (s) Litt. s. 170, and note.
- (t) *Ante*, p. 61; Litt. s. 183.
- (u) 2 Black. Com. 266.
- (v) See Litt. Ten. p. 77; Princ. Com. Law, 302—307.
- (w) 2 Black. Com. 267.
- (a) Litt. s. 347, and note; 5 Barn. and Cr. 585.
- (z) 4 Law Stud. Mag. 267, 268; 5 *Id.* 166, 167; Princ. Eq. 330, *et seq.*
- (y) *Ante*, p. 76; Princ. Com. Law, 32, 33.
- (a a) 1 Steph. Com. chap. 14.
- (a b) 3 Steph. Com. 117.
- (a c) Burton's Comp. 416.
- (a d) Litt. Ten. pp. 40, 41, 153; Princ. Com. Law, 221—223.
- (a e) Princ. Eq. 121 *et seq.*
- (a f) 2 Bl. Com. 284; Litt. s. 74; 16 Law Journ., N. S., Q. B. 110.
- (a g) See *post*, p. 246—252.

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CHAP. XXVI.—P. 193—209.

- (a) R. v. Bridger, 1 M. and W. 145. In *copyholds*, some act by the lord is necessary, 5 B. and Cr. 585.
- (b) Litt. Ten. pp. 34, 160—162; 2 Law. Stud. Mag. 111.
- (c) Noy's Max. 176.
- (d) Princ. Com. Law, 43, 338, 362.
- (e) Litt. pp. 36, 215—217.
- (f) Litt. s. 59, and note.
- (g) 2 Law Stud. Mag. 111, 365; 3 *Id.* 15, 16.
- (h) 2 Bl. Com. 319.
- (i) 1 Steph. Com. 439; 3 *Id.* 139, 145.
- (j) Litt. s. 62, and note.
- (k) Litt. s. 63, and note.
- (l) Litt. s. 243, *et seq.*
- (m) Litt. s. 240, and note.

- (s) Co. Litt. 273.
- (o) Litt. s. 466, *et seq.*
- (p) Litt. ss. 478, 480.
- (q) Co. Litt. 9b; Litt. ss. 467, 468.
- (r) Litt. Ten. p. 196—205.
- (s) 2 Law Stud. Mag. 50—52; 5 *Id.* 163—165.
- (t) 4 Law. Stud. Mag. 229.
- (u) 2 Bl. Com. 326.
- (v) Co. Litt. 236b.
- (w) Princ. Eq. 266—274.
- (x) 1 Steph. Com. 490.
- (y) Princ. Eq. 269.
- (z) *Ibid.*; 2 Law. Stud. Mag. 39.
- (a a) 1 Law Stud. Mag. 268—270, 301, 302; 2 *Id.* 39, 40; 4 *Id.* 194.
- (a b) Princ. Eq. 272, 273.
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- (a d) 1 Law Stud. Mag. 39.
- (a e) Browell's Stats. 270.
- (a f) See *ante*, p. 197.
- (a g) *Ibid.*
- (a h) 2 Black. Com. 363.
- (a i) Co. Litt. 237; 12 Jur. 672.
- (a j) 2 Bl. Com. 340.
- (a k) 1 Steph. Com. 397.
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- (a n) Princ. Com. Law, 135—139.
- (a o) 2 Bl. Com. 160, 342.
- (a p) 1 Steph. Com. 568.
- (a q) Comyn's Dig. tit. "Patent" A—D; 2 Jur. 906; 5 *Id.* 883, 1087.

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- (a) Noy's Max. 371, 9th edit.
- (b) 2 Black. Com. 354.
- (c) See as to fines and recoveries, Bacon's Abr. title, "Fines and Recoveries;" 9 Jur. pt. 2, pp. 472, 482, 491, 502.
- (z) 1 Steph. Com. p. 531.
- (u a) 1 Steph. Com. 538.

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- (a) Litt. s. 167.
  - (b) 2 Steph. Com. 58.
  - (c) Co. Litt. 111b, notes.
  - (d) 2 Steph. Com. 557.
  - (e) See ante, p. 112; 6 Law Stud. Mag. 17.
  - (f) 2 Law Stud. Mag. 320.
  - (g) 4 Law Stud. Mag. 278, 279; 3 *Id.* 299.
  - (h) 1 Steph. Com. 554, 555.
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- (a) Litt. ss. 73, 77, and notes.
  - (b) Litt. s. 81; 3 Law Stud. Mag. 27, 28, 131, 132; 2 *Id.* 228, 229.
  - (c) Princ. Com. Law, 28; 8 Jur. 1121.
  - (d) Litt. pp. 47, 48.
  - (e) Pract. Com. Law, 281, 282, 311, 312.
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  - (g) See ante, pp. 220, 221.
  - (h) Litt. ss. 74, 79.
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- (a) Litt. s. 324.
- (b) See as to killing hares, p. 475.
- (c) Princ. Com. Law, 160, 232, 246.
- (d) 2 Steph. Com. 74, 101.
- (e) See Coleridge's note to 1 Bl. Com. 398; 2 Steph. Com. 75, 76.
- (e\*) Finch's Law, 178.
- (f) Princ. Com. Law, 224; Princ. Eq. 256.
- (g) Princ. Eq. 256, 257.
- (h) 12 Jur. pt. 2, p. 240.

- (i) See *Princ. Eq.* 251—255; *Princ. Com. Law*, 223; *Pract. Com. Law*, 63, 148.
- (j) 2 *Black. Com.* 410.
- (k) 2 *Black. Com.* 421.
- (l) [b] *Abington v. Lipscombe*, 1 Q. B. Rep. 776.
- (m) *Co. Litt.* 18b, n. 7.
- (n) *Co. Litt.* 46.
- (o) *Princ. Com. Law*, 72, 73, 343—345; 4 *Law Stud. Mag.* 141—143.
- (p) 3 *Jur.* 186; *Co. Litt.* 300, 351.
- (q) 6 *Law Stud. Mag.* 106—115, 133—149; *Princ. Eq.* 85—92.
- (r) 6 *Law Stud. Mag.* 309.
- (s) *Princ. Equity*, 150—156.
- (t) *Hibblewhite v. M'Morine*, 5 *Mees. and W.* 462.
- (u) *Princ. Com. Law*, 43—49; 6 *Law Stud. Mag.* 353.
- (v) *Princ. Com. Law*, 387—399.
- (w) *Id.* 52.
- (x) 6 *Law Stud. Mag.* 380; *Princ. Com. Law*, 299—302, 343.
- (y) [p. 240] *Princ. Com. Law*, 394.
- (z) [p. 240] 5 *Mees. and W.* 462.
- (aa) *Princ. Com. Law*, 2, 229, 230.
- (ab) 4 *Law Stud. Mag.* 65.
- (ac) *Princ. Com. Law*, 146, 160, 232, 246.
- (ad) *Id.* 206, 230; 6 *Law Stud. Mag.* 266, 267; 4 *Id.* 139—142.
- (ae) 4 *Law Stud. Mag.* 141, 142.
- (af) 4 *Id.* 76, 77.
- (ag) 2 & 3 *Vict. c.* 11, s. 8.
- (ah) 6 *Law Stud. Mag.* 194—196.
- (ai) See *Princ. Com. Law*, 337—386.
- (aj) 14 *Quart. Law Mag.* 99; 10 *Jur.* 508.
- (ak) 8 *Law Mag. N. S.* 202—222.
- (al) *Princ. Com. Law*, 326—330.

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CHAP. XXXI.—P. 246—255.

- (a) 5 *Law Stud. Mag.* 139.
- (b) 6 *Id.* 246, 247.
- (c) 2 *Bl. Com.* 476.

- (d) See a fuller enumeration of the various acts, 6 Law Stud. Mag. 247, 248.  
(e) 5 Law Stud. Mag. 221—223.  
(f) Princ. Com. Law, 108—111.  
(g) 1 Selw. N. P. 232, 11th edit.  
(h) 1 *Id.* 249, 250.  
(i) 5 Law Stud. Mag. 83; 6 *Id.* 364.  
(j) 6 Law Stud. Mag. 210, 211.  
(k) 5 *Id.* 292.  
(m) 5 *Id.* 139, 140.  
(n) 2 *Id.* 158, 159; 6 *Id.* 210, 211.  
(o) Princ. Com. Law, 83—85; 2 Law Stud. Mag. 446—448.  
(p) 2 Law Stud. Mag. 16, 158, 159.  
(q) 5 *Id.* 40; 6 *Id.* 264.
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## CHAP. XXXII.—P. 256—263.

- (a) See pp. 221, 222.  
(b) 2 Law Stud. Mag. 146—148, 191, 192, 469—471.  
(c) Princ. Com. Law, 65, 66, 159, 171—175.  
(d) 4 Law Stud. Mag. 19, 20; 5 *Id.* 268.  
(e) Princ. Equity, 128, 129.  
(f) 1 Steph. Com. 559, 560.  
(g) 5 Law Stud. Mag. 165, 166.  
(i) Cave v. Roberts, 8 Sim. 214.  
(j) 2 Bl. Com. 516, 517.
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## CHAP. XXXIII.—P. 264—268.

- (a) Selw. N. P. 31, *et seq.*, 11th edit.  
(b) 5 Law Stud. Mag. 267, 268.  
(c) 3 *Id.* 150—153; 4 *Id.* 76, 325—327.  
(d) 3 *Id.* 152; 4 *Id.* 74.  
(e) 4 *Id.* 74.  
(f) 16 Law Journ., N. S., C. P. 227.  
(g) Selw. N. P. 669, *et seq.*  
(h) 4 Law Stud. Mag. 75.  
(i) Princ. Com. Law, 163.

- (j) *Pract. Com. Law*, 433—440; *Princ. Equity*, 44, 45.
- (k) 3 *Law Stud. Mag.* 19; 4 *Id.* 268.
- (l) *Litt. Tenures*, pp. 234, 235.

## CHAP. XXXIV.—P. 269—296.

- (a) *Princ. Com. Law*, 1, 5—10.
  - (b) *Id.* 1, 148—153.
  - (c) *Id.* 38—85.
  - (d) *Id.* 129—144.
  - (e) *Id.* 86—129.
  - (f) *Id.* 35—37.
  - (g) *Id.* 212.
  - (h) *Pract. Com. Law*, 360, 361.
  - (i) 4 *Law Stud. Mag.* 173, 174.
  - (j) *Princ. Com. Law*, 217, 221.
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  - (l) *Pract. Com. Law*, 105; 6 *Law Stud. Mag.* 282.
  - (m) *Pract. Com. Law*, 97—100; *Princ. Com. Law*, 171.
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  - (p) *Id.* 188, 189, 199, 202, 203, 208.
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  - (r) *Id.* 185, 214, 218.
  - (s) *Id.* 214—216.
  - (t) *Id.* 216, 217; *Selw. N. P.* 660.
  - (u) *Princ. Com. Law*, 227—254.
  - (v) *Id.* 145—147.
  - (w) *Id.* 133, 261—265.
  - (x) *Pract. Com. Law*, 416, 417.
  - (y) *Id.* 420.
  - (z) See as to Replevin generally, *Selw. N. P.* 1185—1129.
- 11th edit.
- (a a) *Bacon's Abr. tit. "Offices," N.*
  - (a b) *Princ. Com. Law*, 148—152, 183—225.
  - (a c) 6 *Law Stud. Mag.* 150—153.
  - (a d) *Princ. Com. Law*, 160—164.
  - (a e) *Id.* 148—183.
  - (a f) 6 *Law Stud. Mag.* 150—153.
  - (a g) *Princ. Com. Law*, 154—158.
  - (a h) *Id.* 190.
  - (a k) [p. 289] *Pract. Com. Law*, 426, 427, 429.

- (a i) Princ. Com. Law, 12—17.
- (a j) Bacon's Abr. tit. "Dower," D., F.
- (a k) Princ. Com. Law, 221—223; Princ. Equity, 121—123.
- (a l) Princ. Com. Law, 7—10.
- (a m) See Bacon's Abr. tit. "Prerogative," E. 7.
- (a n) *Id.*
- (a o) Selw. N.P. 1155—1183.
- (a p) *Id.* 1077—1100.
- (a q) Bacon's Abr. tit. "Prohibition."
- (a r) Princ. Com. Law, 1, 139; Pract. Com. Law, 430.
- (a s) *Id.*

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CHAP. XXXV.—P. 297—319.

- (a) See *post*, p. 449—453.
- (b) Pract. Com. Law, 81—87.
- (c) *Id.* 365—371.
- (d) *Id.* 78—81.
- (e) *Id.* 87—134.
- (f) *Id.* 109—118.
- (g) *Id.* 109—134.
- (h) *Id.* 109, 118, 119.
- (i) *Id.* 149—154.
- (j) *Id.* 141, *et seq.*
- (k) *Id.* 321—324.
- (l) *Id.* 155—169.
- (m) *Id.* 138—140, 164—168.
- (n) Princ. Com. Law, 28<sup>f</sup>—316.
- (o) Pract. Com. Law, 356, 357.
- (p) *Id.* 180.
- (q) *Id.* 325—329.
- (s) *Id.* 247, 248.
- (t) *Id.* 181—183.
- (u) *Id.* 190.
- (v) *Id.* 219—223.
- (w) *Id.* 205—209.
- (x) *Id.* 169—172.
- (y) *Id.* 204, 205; 5 Law Stud. Mag. 48, 80; 6 *Id.* 319—321.
- (z) Pract. Com. Law, 252—274.
- (a a) *Id.* 344, 346.



- (a b) *Id.* 239.
  - (a c) *Id.* 332, 334.
  - (a d) *Id.* 281—286.
  - (a e) 6 *Law Stud. Mag.* 268, 269.
  - (a f) *Pract. Com. Law*, 300, 305, 311.
  - (a g) *Id.* 300, 311—315.
  - (a h) *Id.* 430—433.
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## CHAP. XXXVI.—P. 320—337.

- (a) See *Princ. Eq.* 7, 8, 11.
  - (b) 2 *Story's Eq. Jurispr.* 24.
  - (c) *Princ. Equity*, 220—222.
  - (d) *Id.* 243—265.
  - (e) *Id.* 244.
  - (f) 2 *Story's Eq. Jurispr. s.* 1505.
  - (g) See *post*, p. 463, *et seq.*
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## CHAP. XXXIX.—P. 346—348.

- (a) 1 *Black. Com.* 256; 3 *Id.* 288; *Pract. Com. Law*, 98.
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## CHAP. XLIII.—P. 375—378.

- (a) See *ante*, p. 242.
  - (b) See *ante*, 252—255.
  - (c) See p. 232, 233.
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## CHAP. XLIV.—P. 379—383.

- (a) *Princ. Com. Law*, 132, 367, 368.

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- (a) *Pract. Com. Law*, 440—444.
  - (b) *Id.* 443, 444.
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CHAP. XLIX.—P. 417—445.

- (a) 2 *Law Stud. Mag.* 200, 201, 231, 232.
  - (b) 6 *Law Stud. Mag.* 326.
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CHAP. L.—P. 446—474.

- (a) *Princ. Equity*, 1—6.
- (b) *Id.* 1, 2.
- (c) *Id.* 2.
- (d) *Id.* 12—14.
- (e) *Id.* 12, 14.

## ABBREVIATIONS IN REFERENCES.

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- BAC. ABR.**—Bacon's Abridgment.  
**BEAV.**—Beavan's Reports.  
**C. B. REP.**—Common Bench Reports.  
**COM. DIG.**—Comyns's Digest.  
**CO. LITT.**—Coke upon Littleton.  
**EXCH. REP.**—Exchequer Reports.  
**INST.**—Coke's 2nd, 3rd, or 4th Institutes.  
**JUR.**—The Jurist.  
**LAW JOURN. N.S.**—Law Journal, New Series.  
**LAW STUD. MAG.**—Law Students' Magazine.  
**LITT.**—Littleton's Tenures (published in the "Law Students' Library."  
**M. AND W.**—Meeson and Welsby.  
**PRACT. COM. L.**—Practice of the Common Law (published in the "Law Students' Library").  
**PREST. EST. or ABST.**—Preston's Estates, *or*, Abstracts.  
**PRINC. COM. L.**—Principles of the Common Law (published in the "Law Students' Library").  
**PRINC. EQ.**—Principles of Equity (published in the "Law Students' Library").  
**Q. B. REP.**—Queen's Bench Reports.  
**SHEPP. TOUCH.**—Sheppard's Touchstone.

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